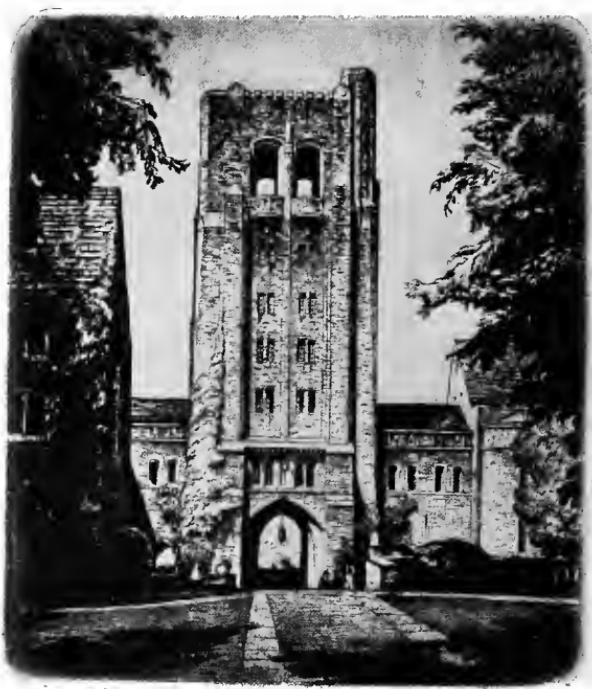
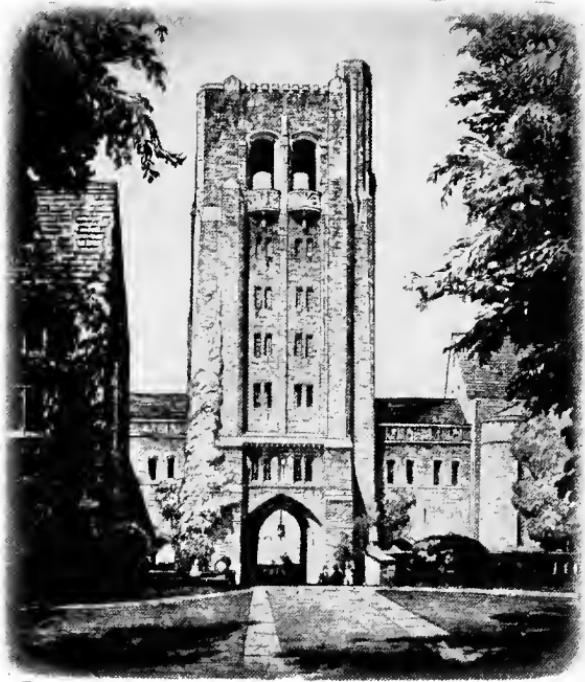


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A history of English legal institutions



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A HISTORY OF ENGLISH LEGAL INSTITUTIONS

BY

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PREFACE

THIS book is based on a volume published nearly four years ago, which was little more than a course of lectures on English Legal History that I delivered in the Inns of Court.

Time has brought fuller information, and has modified some of the views then expressed, with the result, I hope, that a more accurate and complete view of our legal history is now presented to the reader.

Accurate historical knowledge is of itself a good and desirable thing, but here it has I think a special value of its own. In England we have a legal system which we can trace from its small beginnings; a system which, I will venture to say, is more interesting and not less perfect than that of Rome; a system which displays in the history of its development all those features which the student of Jurisprudence is invited to study. The nature of Law, and its relation to Custom, the relation of Law to Sovereignty, the foundation of jurisdiction in consent, the value and position of Legal Fictions, Equity, and Legislation, the existence of Royal residuary jurisdiction, all are topics which are illuminated by a knowledge of our own legal history.

PREFACE

And here surely we find the true view of the relation of Historical and Analytical Jurisprudence. No system of Analytical Jurisprudence can be at the same time scientifically true and historically false. ‘After all,’ said the late Lord Coleridge in court one day, ‘things are what they are, and not other things,’ and one negative instance properly established is the death of the most flourishing generalization.

Armed with a knowledge of the legal history of his own country, and, if possible, of other countries also, the student will be in a position to consider for himself the value of the Austinian and Neo-Austinian canons in Jurisprudence.

To all those authors whom I quote I offer my grateful acknowledgements, especially to Professor Maitland and the other editors of the volumes of the Selden Society, from some of whom I have received personally great kindness. I desire to thank Sir Frederick Pollock for generous encouragement, and for permitting me to use two articles originally written for the *Law Quarterly Review*.

Lastly, I am much indebted to my brother, Mr. R. C. Carter, of the Inner Temple, for revising the Text, arranging the matter, and seeing the book through the press, things which sudden illness forbids me doing for myself.

A. T. C.

OXFORD,
Sept. 1902.

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CHAPTER I

EARLY LAW AND CUSTOM

WE are told by those whose authority we should neither wish nor venture to impugn that human society displays three great types. The first of these types is associated with a minimum of culture, it does not seek or care to identify either parent, and it is illustrated by the Totemic group. The second type exhibits the so-called Matriarchal system, which seizes on the one fact in family relationship that is capable of proof, and traces descent through the mother. In the third and highest type we find what is well known to us as the Patriarchal Family system, where descent is counted through the father, who is the head of the Family. The Patriarchal idea finally acquires such force as to cause the want of natural children to be artificially supplied by adoption. This Family, it has been widely held, eventually expanded into the Clan or Tribe; blood relationship, real or fictitious, being at the bottom of both organizations. But here we wander in the pleasant fields of speculation. We know of the three types, but we do not know what if any relationship exists between any two of them, and whether there is any constant relation between Family and Clan.

We are so accustomed to regard the Family as the unit of society, that we are in danger of forgetting that there were and are places where this unit is unknown. It is a perplexing problem to find the source of the Family idea.

That it was part of the original equipment of our animal nature we can hardly assert in presence of the behaviour of the young of birds and beasts, who, on learning to fly and run, leave the home, and know their parents no more. There is also plenty of evidence in the old writers, and modern investigation confirms them, of a social condition in which the family idea is barely discernible. Both in Herodotus and Strabo accounts are given of societies where the family is either non-existent or is beginning to emerge from a larger group¹.

Anthropologists may some day agree in fixing the true relation of the Family to the Tribe, and they may allot an undisputed place in this scheme to the Cave man. Lurking like a Cyclops in his lair, with his squaw and his litter around him, did he lead a life which Hobbes describes as ‘solitary, poor, nasty, brutish, and short,’ or did he—and this view has evidence to support it—form part of some larger kind of association within the cave? It may be that some day we may be told whether the swarm crystallized out into the Family or into the Tribe or into both Family and Tribe². Sufficient for the purposes of our inquiries, which

¹ Cf. the account of the Gindanes who enjoy a system of free love (Herod. iv. 176), and of the Massagetae, who seem to have a mixture of individual and joint ownership in women (ib. i. 216). So in Strabo 783 there is mention of a system in Arabia of common ownership *within the tribe*, μίγνυνται δὲ καὶ μητράστ· μοιχῷ δὲ ξῆμα θάνατος, μοιχός δ’ ἔστιν δὲξ ἀλλού γένους. They have these institutions, says Strabo, in order that they may all be brothers. Herodotus gives precisely the same explanation of the similar practice of the Agathyrsi, who thus anticipated Plato’s sketch of a society made stronger by the absence of the family tie (*Rep.* bk. v.). Symptoms of a change are perhaps discernible in the case of the Auseans (Herod. iv. 180) who have connexion κτηνηδόν, but when the child is three months old all the men collect, and he is said to be the father whom the child resembles: see also Herodotus’s account of the Nasamones (ib. iv. 172), whose bridal night custom of promiscuous intercourse with the guests may be regarded as a compromise between joint and several ownership.

² I am indebted to my friend and colleague Mr. J. L. Myres for

for we may suggest that one of the marks of a Nation is that it has a notion of 'legality,' that is, that it is inclined to obey similar or identical rules of conduct, and we explain this inclination by the fact that the Nation is composed of men who have either inherited or acquired a similar character.

It is good for us, the cultivated product of the rigorous training of past ages, to realize the condition of the Primitive man, who did what was right in his own eyes, whose notions of law were those of a Cyclops, and whose morality was to be found, if anywhere, in what Mr. Bagehot has called wild spasms of wild justice, half punishment, half outrage, vague and intermittent.

My thesis is that the Law grows as the Nation grows, that the one cannot be checked without the other being blighted, that, in short, the phenomena of them both are but two aspects of the same great process.

When our race was young, the good and efficacious rule of Nature was, that the weakest went to the wall, and that only those won who were fit to win. Those communities which had the aptitude for cohesion killed or enslaved those who had not. Any form of polity—and the worst of them implies a subordination of more or less value—is better and

pointing out that it is possible that when private property was recognized in domesticated animals, property in children became valuable, inasmuch as children were useful in keeping the animals from straying, and that whereas for this reason pastoral people desiring children would naturally be polygamous, the fighting peoples on the march do not wish superfluous womenkind. They make the laager too big. Such people are monogamous.

stronger than none. This notion of political subordination, of willing and rational obedience, is natural to us who are the children of the past, but there must have been a time when such submission was a strange and temporary expedient.

Modern
Law and
Ancient
Custom.

Laws are laws with us because we wish them to be so, 'we count heads to save the trouble of breaking them,' we obey laws because we ourselves have made them. How far this condition of things satisfies the Austinian canons may perhaps be open to discussion, but there can be no doubt that they have no application to early states of society. In those rude times there was no law in the Austinian sense. Custom there was, declared and, if we remember the history of our own common and judge-made law, we may probably add, moulded by the kings in 'dooms' or *θέμιστες*, i. e. judgments on particular occasions. Such law was 'half an invincible prescription and half a Divine revelation.' The worship, so widely prevalent, of the Ancestor, who was either originally a God, or who at his death was gathered to the Gods, and still watched over the fortunes of his descendants, and expected customary honour from them, tended to give the utterances of the chief who was himself 'about to become a God' a special and religious value.

Power of
Custom.

Breaches of customary observance—and in those times, religion, morals, ceremonies, and sanitary ordinances were all one, nor must we forget that in some places they are so still—exposed the offender to serious penalties as one who had risked bringing ill fortune on his community. The savage is like a child, he is afraid lest he has made somebody angry, like a child he is imitative, and like some children of an older growth he is the slave of precedent. To do something which no one has done before is to do something, or to run the risk of doing something, wicked or, what is just as bad, unlucky. Not however unlucky to the sinner only. As Mr. Bagehot has happily said, 'Guilt with us is an

individual taint consequent on choice, and clinging to the chooser. The early tribe or nation is a religious partnership on which a rash member by a sudden impiety may bring utter ruin. There is no "limited liability" in the political notions of that time.⁷ If this is the accepted view, toleration, as he observes, is not only wicked but silly. Church and State are identical, and custom enforced often enough with savage sanctions binds the community together. Those communities that submitted most quickly have vanquished those who were less tractable. Those that have stooped to discipline have stooped to conquer—the meek have inherited the earth.

This, says Mr. Bagehot, is the first step towards civilization, and a great part of the human race has never taken a second, for 'tyrant custom' has killed out all those propensities to variation which are the root of progress. If we look for the reason why some stood still while others went on, we are struck by the fact that the progressive peoples consisted of fighting communities on the march, whose system was Patriarchal and monogamous, and whose family life contained a military despotism 'writ small.' But this is not all. The Aryan groups agree in exhibiting a uniform type of polity. We always find them ruled by a chief, a ring of wise men, and a general assembly. Whether or no this form of government was a polity inherited by these groups from some common source, it is one which we are not surprised to find in an armed host of free men always on the march. Doubtless for the purposes of a battle or a campaign, a temporary despotism was accepted by men whose military sense told them what Macaulay told a later race, that no army ever prospered under a debating society. In struggles which were affairs of victory or extinction, there could be no systematic evasion of responsibility. The conscious employment and endowment of incompetence mark

Type of
polity of
so-called
'Aryan'
groups.

a more complex and less virile organization. Experience taught those rude and simple people that when something has to be done the wisest policy is to select the best man, and confer on him some kind of dictatorship. But that in matters of general policy the sense of the free men was taken, ancient and mediaeval history agree. One cannot help feeling that Mr. Bagehot's acute discernment led him aright when he said that 'discussion' was the great solvent of custom, for if a subject may be discussed it is an admission that men are free to choose. Add to this the fact, to which too much weight can hardly be given, that those men were on the march through new scenes, climates, necessities, and dangers, in the midst also of new populations with whom they intermarried, and it is not hard to see that adaptability to new conditions was essential to their existence.

Fate ordained that Western Europe should be the great arena in which the travelling swarms should fight their battle out, and this circumstance gave a position of perma-

The King. nent prominence to the host-leader or king. When the long march is finished the conquering host settles down and becomes a territorial unit, rules of conduct are evolved by a process of comparison and selection, and the king stands forth as guardian and declarer of the customs.

The Council. Probably he was not much more than this. The depositaries of custom and old usage are naturally those members of the community who possess the longest experience. These 'Ancients' or *γέροντες* remember, or, what is much the same thing, say that they remember, precedents exactly in point, and are not unwilling to give advice. We may note that in our own history the king has always been in theory advised by wise men, whether they be called Witan, Council, or Parliament.

From these councillors the king gets his law, but he must depend on his own wit or sagacity to arrive at a right

judgement on the facts, and should he succeed he will be likened to Solomon. He is not expected to legislate or make new law, his duty—which he must not exceed—being to maintain old customs. And although now half of our countrymen would probably say that the important work of Parliaments is to make new laws, the great number of early declaratory statutes bear testimony to the fact that society then regarded change with apprehension and dislike.

If the nature of custom be borne in mind, much that was obscure becomes plain. We find various customs existing in various parts of England, and we particularly notice the three great systems of Custom called, respectively, the Dane Law, the Mercian Law, and the Wessex Law, which at one time portioned out and prevailed over the greater part of this country. But, under the centralizing influence of the Norman Kings, the only custom that survived was the custom of the King's Court, that is, custom formed by a process of comparing, selecting, and rejecting local customs. In this process we can hardly doubt that 'generality,' in the sense of wide acceptance, was a determining characteristic, for such acceptance is the best evidence of suitability. The custom of the King's Court was what we know now as the Common Law. It is not needful to descant here on its merits. Coke declared it the 'perfection of reason,' and that is perhaps high enough praise. But it is proper to suggest why this praise may not have been undeserved. The Common Law was a careful selection from those usages which from time to time the common sense and experience of our countrymen pronounced to be valuable. It was set forth in no Code, but was said to be 'in gremio iudicum,' and in this way much of our law is 'judge-made,' an origin which some philosophers consider a reproach, though in reality it should be a title to regard, for the judges give

Relation
of Custom
in Eng-
land to
Common
Law.

articulate expression to the common legal consciousness, so that the law makes a healthy and continuous growth, ‘crescit occulto velut arbor aevo,’ adapting itself to new environment, developing, yet preserving identity.

Composition of
English
Law.

Such being the nature of Custom, we may venture to suggest what ‘Law’ is. With us Statute Law is found in Acts of Parliament, anything else is law when pronounced by the courts to be so, and not until that moment. Custom is a great source of law, and law derived from that source may be styled Customary Law. The only disadvantage in using that phrase is that some writers have fancied that Customary Law is a *tertium quid*, ranging somewhere between Law and Custom. This notion may be at once dismissed. Custom is not law till it is recognized by the Courts.

General
and Par-
ticular
Customs.

At this point we must distinguish between general and particular customs. A ‘general’ custom when proved and judicially accepted need not be proved again, it has passed out of the region of facts into that of law, it is part of the Common Law, and the courts ‘take judicial notice’ of it. In this way the ‘custom of merchants’ has become part of the law of the land so gradually that to-day it is hard to say what the custom of merchants precisely was. A ‘particular’ custom, on the other hand, must be proved like any other fact as often as it is desired to read it into a contract; it is a matter of fact for the jury, and not a matter of law for the judge, and it is allowed for on the assumption that both parties had it in their minds when making the contract, and that to disregard it would be to fail in effectuating the intention of the parties.

The usage of merchants made a Bill of Exchange negotiable, when contracts were unassignable at Common Law, and a Promissory Note actionable when Common Law required a seal. This is indeed rather ancient history, but in the

Bechuanaland case¹ Mr. Justice Kennedy with the approval, I believe, of the profession declared that the virtue of custom is still alive, and that a general custom may still win its way into the Common Law. Some have said that beside being general the custom must also be immemorial. In answer to this criticism it is enough to point out that there must have been a time when most mercantile usages were recent, and that inland Bills of Exchange in particular were anything but immemorial when recognized as negotiable by the Courts. Thus has the Common Law grown, and its relationship to general custom both proves and explains its vigorous life, and its 'perfection of reason.'

¹ *Bechuanaland Exploration Co. v. London Trading Co.*, 1898, 2 Q. B. 658, followed and approved by Bigham J. in *Edelstein v. Schuler and others*. *The Times*, May 10, 1902.

Appearance
of the
Nation.

CHAPTER II

THE KING AND EARLY JUSTICE

In the preceding chapter attention was invited to the possible effects of external pressure on Tribal development ; it remains to offer a hypothesis explaining the appearance of the Nation. The Tribal or Clan organization depends largely for its cohesion on the feeling that attaches to blood relationship real or fictitious. A basis of this kind is not essential to the life of the Nation, though, as in the case of the Romans and the 'children of Israel,' signs have not been wanting of a willingness to call on that powerful sentiment to come to the assistance of national stability.

Here, too, external pressure has done its work. In early warfare there are few half-tints ; there is usually a bare choice between triumph and extinction. Victory rewards those who first estimate the value of co-operation and of the subordination of means to ends. We have to suggest that those clans which combine, survive, and that those which do not, disappear. The surmise is simple and attractive, for it conforms to the great law which proclaims the survival of the fittest. Nor is evidence wanting to support it. We read that in the time of Tacitus, the Germanic peoples were divided on the clan system, and the historian fortunately gives the names amongst others of the Chauci and Cherusci. In the three centuries after Tacitus wrote, we find that these clans have disappeared in new groups, these groups being known as Franks, Saxons, and Alamanni, and that the Saxon

group includes the Chauci and the Cherusci. It is quite possible that in the legendary story which makes Romulus divide the Romans into the three tribes of Ramnes, Tities, and Luceres, we have the true order of events reversed, and that the Hero owed his eminence to the amalgamation of three blood groups.

For as the instinct of self-preservation produces combination, so it demands that the combination shall be efficiently led. The league produces the *Heretoch* or the host leader¹, the war lord or king. Thus on the continent, Prince Hugh was chosen, by the Frank, Burgundian, and Aquitanian princes gathered together, to be a leader in war against the Huns, who, 'drunk with slaughter, rapine and all kinds of cruelty, poured themselves over the Gauls'². And in the history of the children of Israel we know that 'the Judges' were elected in times of great stress to deal with the enemy; and that when Saul was elected king, the people said, 'We will have a king over us that we also may be like all the nations, and that our king may judge us and go out before us and fight our battles.' One cannot help observing that Samuel in his warning to the people sketched out in a remarkable manner a conception of a feudal monarchy³.

A king being, it is suggested, primarily selected to deal with external foes went on to deal with internal disorder—Saul's commission we notice is twofold—thereby anticipating the view advanced by Mr. Herbert Spencer, when he says that the true functions of the State are to protect against external enemies and to suppress internal anarchy.

Following the accounts of early writers, we find that the patriarchal or primitive man, if he suffered injury, took his

The
kingly
office : its
military
character.

¹ Cf. the quotation from Baeda, *Hist. Eccl.* v. 10, on the custom of the Saxons, 'ingruente belli articulo.' Stubbs, *Sel. Ch.*, p. 59.

² Jenks, *Law and Politics in the Middle Ages*, cc. 1-4.

³ 1 Sam. viii.

revenge as well as he could. If he was slain his relatives took indiscriminate vengeance on all who were supposed to be connected with the murder or with the murderer. A distinct advance is made when it is recognized that the right of vengeance belongs properly only to a limited circle of the relatives of the dead man, and that retribution can only properly be enacted from a limited circle of the relatives of the offender. This is the stage of what is called 'the blood feud,' and is to be found even now in some form in primitive and uncivilized communities. The next stage is reached when it is perceived that this slaughter, even though confined to a certain area, is hurtful to the society which permits it. It is perceived to be a wasteful expenditure of human life, which has a value for the community, and must not be appropriated to a private feud.

Buying
off the
Feud.

In a state of society, to call it so, where the problem of over-population was unknown and probably would have been unintelligible, where no humanitarian sentiment nullified the principles of natural selection, where only the strong could live, where the father of many male children was happy in that he could speak with his enemies in the gate, and 'handfasting' and 'bundling' were but natural tests of capacity, as on our own Borders, the community could ill spare its warrior, its man who could fight, and there grew up the view that a compensation is to be permitted, i. e. a payment to buy off the feud. Indeed the word *faidus*, which is found on the continent, means indifferently the feud itself or the payment which buys it off. It was apparently at first quite optional with the injured party or his relatives to take or reject the payment, but the amount of the payment seems at a very early period to have been settled by the common judgement of the community. Then there grows up what may be called an *opinio necessitatis*, i. e. the opinion that compensation *ought* not to be denied when asked or refused

when offered. There are, however, some offences which are so grave as to be irredeemable or, as it is called, *bootless*. For them no payment is permitted. For instance, if a man catches his enemy asleep or in church and kills him, he is expelled by his community and driven forth an outcast. The stage at which compensation became customary cannot have been very much anterior to the compilation of customs known as the *Leges Barbarorum*, for the *Lex Salica*, the *Lex Ribuaria* and the *Dooms of Ethelbert* are full of minute regulations on the subject.

At this point we mark the intervention of the King, who takes advantage of public opinion to compel the payment of the compensation. He also compels the acceptance of it, and he takes $33\frac{1}{3}$ per cent. of the compensation for his trouble. In Anglo-Saxon language the general word for compensation is *bot*. The word for that part of the compensation which goes to the injured man or his relatives is *wer*, that part which goes to the king being called *wite*. On the continent the word *faidus* stands for *wer*, while the word *fredus* is the equivalent of *wite*, and means a fine for the breach of the king's peace, *friede*. And it is interesting to see that so strong has the king's position become, that in the peace of Hildebert and Clothar, if a man compounds *secretly* for theft, he is a thief, for he has got the king's share. The action of the king with reference to the man who has committed a bootless offence deserves special mention. The expulsion of the offender by the community which he has outraged is harmful to the king's interests, for it takes away a warrior; the king therefore will overlook the offence on payment of a fine—to the king. The offender returns from the wilderness, and exemplifies the first operation of the new idea—Punishment, as opposed to Compensation. For offences, which the king or the State can pardon, come naturally to be considered offences against the king or

The
'bootless'
offence.

The King
and
Criminal
Justice.

Tort and
Crime.

against the State. And this, it is suggested by Mr. Jenks, is the historical origin of the distinction which we nowadays observe between Tort and Crime.

We possess the list, or rather the lists, of the Anglo-Saxon compositions (*wergild*). These compositions varied in various places ; but in Anglia the king's life was valued at 30,000 thrimsas, the prince's at 15,000, a bishop's or alderman's 8,000, a sheriff's 4,000, a thane's or cleric's 2,000, a churl's 266¹.

Adjective
Law : its
priority.

The first problem that meets a political society, so imperfectly co-ordinated that 'force is no remedy,' is how to persuade the plaintiff (for it cannot compel him) to come into court, and deny himself the pleasure of private revenge. The next task is to consider the means of forcing the defendant to come in. The plaintiff was bribed in various ways. In the Roman law we know that the *furtum manifestum* is punished with twice as much severity as the *furtum nec manifestum*, and the explanation which is offered is that the injured man would be more likely to stay his hand when he caught the thief in fresh pursuit, if he knew that the law would, in punishing the culprit, consider not only the nature of the offence, which was indeed the same in both cases, but also the legitimate indignation of the law-abiding citizen. Our own Henry I decreed that all thieves taken in the act should be hanged². It may, however, be that the skilful thief was considered rather admirable, and that the bungler got no sympathy. *Spondes peritiam artis.*

It is probable that trial by battle was another way of inducing the plaintiff to come in. It is happily suggested by very high authority that the Burgundian rulers, in order to stop the execution of private vengeance, offered the plain-

¹ Stubbs, *Sel. Ch.*, p. 65.

² *Ibid.*, p. 97.

tiff the physical joy of battle together with the intellectual pleasure of legal procedure¹. It is certain that in early stages of legal development, the plaintiff, after he has once got the judgement of the court, is permitted to go and execute the judgement by himself, the explanation probably being that the executive was too feeble to execute its judgements itself².

The prohibition occurring in the *Dooms of Ine of Wessex*, A.D. 680, against taking the law into one's own hands *without going first* to the proper court to seek justice, shows that at that time the 'reign of law' is only beginning. But it was as difficult to bring the defendant into court as it was to persuade the plaintiff to forgo his right of private vengeance. The early codes which are known to us, as Sir Henry Maine pointed out, deal largely with the important topic of summons, e. g. how the defendant is to be brought into court. If he is too ill to move, what steps may the plaintiff take to bring him³? What must be done if the defendant declines to come? Particular instructions are given in case of default of appearance. The remedies of distress and outlawry are freely employed, and down to a recent period the English law recognized the persuasive treatment of the *peine forte et dure* to compel consent to the jurisdiction.

¹ Pollock and Maitland, *History of English Law*, i. 2.

² Cf. an extraordinary custom in the north country mentioned in P. and M. ii. 495, n. : 'Northumberland Assize Rolls, p. 70. *Consuetudo comitatus talis est, quod quamcito aliquis capiatur cum manuopere statim decolletur, et ipse qui sequitur pro catallis ab ipso depridatis, habebit catalla sua pro ipso decollando.*'

³ Cf. the XII Tables.

CHAPTER III

BEFORE THE NORMANS

THE times before the Norman invasion deserve some consideration from our point of view, because they are introductory to the system set up by the Norman and Plantagenet kings, and present certain old and peculiar features which long survived as part of our law.

Our information about these times is not abundant, and in one particular subject there is much undisclosed. But some few points there are which are interesting.

Justice was administered in the hundred courts every four weeks, in the shire courts twice a year¹. These courts had no professional assistance, every man was his own lawyer, it was an assembly of the neighbours. They had no policemen, and no process by which they could compel attendance. If a man declined to come, the only weapon in their armoury was outlawry. The business was mainly the trial of offences of violence and theft, the theft being usually of cattle, civil business was scarce, and credit was almost unknown. One may surmise that they declared the local customs, awarded compensation, and acted generally as a board of mutual arbitration in neighbours' disputes.

Besides these there were courts of private jurisdiction, held in virtue of grants of 'sac' and 'soc,' two mysterious words which seem to mean the right to hold a court, and the right to the profits therefrom.

¹ Stubbs, *Sel. Ch.*, 70, 105.

At the present day a party is required to ‘satisfy the court and jury.’ He was under no such necessity then. It was no duty of the court to try to discover the truth, to weigh the evidence, or even to form an opinion. What the court did, on hearing the particulars of the complaint, was to decide which party should have the proof given to him; having delivered this decision in what is now called a ‘medial judgement,’ the pares curiae were, save as spectators, ‘functi officio.’ The rest was left to God. An appeal was made in some form or other to the supernatural. Incivil cases an oath was taken either by the party alone, or together with compurgators, and if the oath was formally and neatly taken—for ‘qui cadit a syllaba cadit a tota causa’—here was not evidence merely, but actual uncontested proof. Proof was one-sided, and it was accordingly of the greatest importance to settle who was to be allowed to give the proof. In criminal cases also the oath was used, but was reinforced by the ordeal where the accused was a bad character and not oath-worthy, or if the circumstances were too strong, and he was unable to get helpers to swear that they believed his oath. One kind of criminal did not get even this chance; a man taken redhanded was sentenced without any of the law’s delay, ‘ea quae manifesta sunt non indigent probatione.’

A good character was a valuable asset, and its owner, when accused of some offence, might, if the case was not too black, be permitted to clear himself with say eleven compurgators. He swore himself, and if he could so manage that neither he nor any of his friends swallowed some word in the formula or dropped the book on the floor, his innocence was established, he had successfully ‘waged his law.’

The origin of the institution of ‘compurgation’ seems to lie either in kinship or in some form of artificial association, or in both. If the compurgators were not originally kinsmen, kinsmen could always be compurgators. Mr. Pike

Compur-
gation.

prefers to connect the institution with the Gild which in various forms involved the principle of association whether voluntary or compulsory¹. If a man had no kin, and thus the blood feud became nugatory, he must, says Mr. Pike, be given an association. This became general and compulsory. Every free man below a certain rank must be in a Tithing of ten, who mutually insured each other's conduct, and had thus a distinct pecuniary interest in each other's acquittals. The hundred was perhaps originally a gild of one hundred freemen, and had at one time theoretically a view of frank-pledge.

The Danes said that a man who could not name his tithing and hundred was an outlaw, that his kin had no right to compensation, and that if accused he could not get off by compurgation.

It is almost certain, says Mr. Pike, that the fellow tithing men or hundredors could make oath for him, and if they failed they paid. The voluntary gilds in the same way helped the unhappy brother. To screen such a one was not only socially meritorious, but economically correct².

We have noticed³ the extreme formalism of this early procedure, the technicality which is 'the disease not of the old age but of the infancy of societies,' when what a man says is not more important than the way in which he says it.

We now proceed to note another remarkable feature of the justice of those times. The conviction that it is humanly impossible to prove 'intent,' a fact of which a common jury

¹ *Hist. of Crime in Eng.*, 55 sq.

² Whether the institution arose in late blood feud procedure or is one more instance of the efforts which early times make to supply a workable substitute for blood relationship, we may sympathize with Mr. Pike when he condemns it as vicious on two grounds, not merely because it must have profoundly sapped the morals of the laity, but also because it occupied them in persistently proving negatives.

³ Maine's *Early Law and Custom*, c. vi.

of the present day is invited to infer from surrounding circumstances, produced minute rules as to external conduct. Even as late as the seventh year of Edward IV, the Chief Justice Brian said, ‘The thought of man is not triable, for the Devil himself knoweth not the thought of man.’ *A* kills *B*. The question arises—Was it intentional or was it an accident? The Anglo-Saxon court asked, How was *A* carrying his spear? Was he carrying it horizontally on his shoulder or with the point three fingers above the butt? Was he carrying it with the point back or in front? The intent of *A* is not considered, the rule being that a man shall carry his spear in a certain way, and if *A* has abandoned the rule, he has abandoned it at his risk. Again, the difficulty in getting direct evidence of guilt, coupled with the distrust apparently felt for inferential processes, explains the severity of the Anglo-Saxon law against those who have been often accused, and are of no credit. Such a man, if accused of any crime, is already half-condemned: there is no rule that he must be presumed innocent till he is found guilty¹.

It must not, however, be supposed that all over England the laws or customs were identical. Our law was indeed Teutonic, but it came from more than one source. A large element was introduced by the English conquest; a second element was brought from Scandinavia by the Danish invaders, and the Normans contributed another portion, consisting of Frankish ideas and customs, which were nothing more than a variation of Germanic law. About a third of England was known as the Dane law. There was an extensive Danish population which lay to the north-east of Watling Street, and held the five boroughs of Stamford,

Absence
of any
'common
law.'

¹ The late Mr. Justice Stephen expressed his inability to understand why a man should be presumed to be innocent when a Grand Jury have sworn that they thought him guilty.

Leicester, Derby, Nottingham, and Lincoln, places of great size and wealth, besides the important towns of Chester and York, and these Danish Norse people had their own customs. There was no 'common law' of the land. They lived under those customs which they had brought with them from their own country. This difference we find recognized in the various royal enactments. Thus, 'if a mass priest misdirects the people about a festival or about a fast, let him pay 30s. among the English, and among the Danes 3½ marks.' So also the laws of William the Conqueror give the different penalties for breaches of the king's peace by Mercian law, by Dane law, and Wessex law. And in the laws of Henry I we find the law of England divided into three—Wessex law, Mercian law, Dane law¹. And it is said that 'in many things they differ, but in many things they agree.'

Royal jus-
tice not
ordinary.

At this period there is not only no common law of the land, but the king's justice is hard to get. Plaintiffs must not come and trouble the king's court unless they have suffered from failure of justice in the local courts². And the king's justice, when it is obtained, is merely the justice of the *Witan*, or great assembly of the nation, doing for the whole nation what the inferior courts did for their districts, viz. declaring the customs, and, as well as may be, finding the facts.

The King's
military
necessi-
ties.

In one direction the military character of kingship left its mark. Because the king's business was to be the successful leader of his host in battle, he naturally required the best men he could get for his lieutenants. The inevitable result was that the old precedence of birth gave way to the claims of capacity or office. William himself was known as William the Bastard, and in English history several eminent soldiers—of 'composition and fierce quality'—have been

¹ Cf. Stubbs, *Sel. Ch.*, p. 106.

² *Ibid.*, pp. 71, 73.

distinguished by the same name. It was the time when the change is made from Caste to Contract, when men are not so much born great as achieve greatness.

We have noted the theory that the differentiation of Crime from Tort is in a measure due to the military exigencies of the king; and it may be that in the fact that 'beneficia' were granted on terms of military attendance, and that the tenant who did not answer his lord's ban, and the 'gesithcund' man¹ who neglected the 'fyrd,' both forfeited their land, we find an explanation why the 'precarium' of the Continent is the 'fee' in England.

¹ Stubbs, *Sel. Ch.*, p. 62.

Legal development on the Continent and in England.

CHAPTER IV

THE NORMAN CONQUEST

ENGLISH AND CONTINENTAL FEUDALISM

THERE is no evidence for saying that with the Norman Conquest there was any 'reception' of Frankish law. The parent stock of the Anglo-Saxon and the Frankish customs was the same, but, owing to the different conditions which obtained in England and on the Continent, the development was different. England, till the fall of the great Wessex house, enjoyed peace and progress, while the Continent had been distracted by the anarchy which prevailed after the death of Charles the Great. It has been suggested that disturbed conditions, favourable to militarism and royal rule, gave birth on the Continent to the idea of punishment at a period when in this country our forefathers had progressed no further than the stage of bot, wer, and wite. On the other hand, the weakness of Charlemagne's successors produced the system of private jurisdictions, and the disintegrating of the administration of justice, which lasted till the French Revolution. Yet again, it has been suggested by Professor Maitland, that the adoption of the words 'sac' and 'soc' by the Normans when they came over here, indicates that the feudalization of justice had progressed further in England than in Normandy, and that they used these words because they had no words of their own which represented the ideas.

On such a topic it is rash to express any certain opinion in face of so great an authority. But it has been remarked that, although we commonly find grants of 'soc' in the Anglo-Saxon period, grants of 'sac' and 'soc' are not known before the time of Edward the Confessor. Now the difference may be material. For 'soc,' it is suggested, means the profits of jurisdiction, those profits which would otherwise go to the king, while 'sac' means the jurisdiction itself¹. The king might readily grant the profits of the jurisdiction to a favourite vassal, while objecting to part with the administration of justice, which in early society is one of the great prerogatives and obligations of royalty. But the Confessor granted both 'sac' and 'soc' with both hands to all sorts of religious foundations, apparently without the consent of the Witan. We find his grants to the Archbishop of Canterbury, the Archbishop of York, the Abbot of Malmesbury, the Abbey of Westminster, St. Paul's Minster in London, St. Mary's in Abingdon, and St. Edmundsbury. He 'granted entire hundreds outright into the hands of the church.' The Confessor was, apparently, the first English king to whom such jurisdiction appeared to be a part of his own private property. The view was novel and unconstitutional, and it does not seem to have survived the advent of the Normans, although, probably, it was from his acquaintance with Frankish customs that the Confessor had imbibed these high notions of his property in justice and jurisdiction².

The jurisdiction of the manor court is explained by Suggested origin of

¹ This is the view most strongly maintained by Mr. Henry Adams in the essay contributed by him to *Essays in Anglo-Saxon Law*, pp. 40–44, Boston, 1876. 'Saca' and 'sōcn,' he says, are the equivalent of 'placita et forisfacturae.' It should, however, be stated that the general opinion seems to be that 'soc' means jurisdiction, and that 'sac' means profits; and that Professor Maitland in *Domesday Book and Beyond*, p. 84, inclines to the view that they are practically synonymous.

² *Essays in A.-S. Law*, pp. 51, 59.

Private jurisdictions.

'Sac' and
'soc.'

the Manor Court Mr. Adams in a very plausible way. That the manor courts had some sort of jurisdiction at the time of the Conquest seems to be generally admitted, though we can find no trace of jurisdiction that has been expressly granted to the lord sitting in his court of the manor. But that rights of 'soc' were occasionally given to the lord seems certain from expressions which occur in the Anglo-Saxon documents¹.

based on
consent of
parties.

The popular courts being in truth assemblies of neighbours for mutual arbitration, it was apparently the almost invincible practice to accept a compromise, which was suggested by the friends of the parties. Arbitration indeed, as we all know, is, even now, sometimes preferred to law courts' justice with its delays and its uncertainties; and it possibly only required the consent of the parties to invest the manorial court with the powers of the hundred court, and if both parties were tenants of the same lord, it would be not unnatural for them to agree to try the case before him. He probably had a grant of 'soc,' no doubt he observed the usual forms, and there would be a gain of convenience to the litigants. Besides, the recognition of the private jurisdiction of the churches would assist the recognition of private jurisdiction generally. Thus by royal grant, or by prescription, grew up a new kind of local court. The result was that after the Confessor's reign, as Mr. Adams puts it, 'the entire judicial system of England was torn to pieces,' 'justice was no longer a public trust but a private property.' The manor court was always considered a private or proprietary hundred court. It administered the law of the hundred, it observed

¹ In the laws of Knut ii. 73, § 1, we find: 'Let him forfeit his wer to the king or to him to whom the king may have granted it.' Codex G provides a variant reading of 'his sôcne' for the word 'it.' So again, the Codex reads on Knut ii. 63: 'If any one take by force another's property, let him return it and its value, and forfeit his wer to the king or to whoever has his socn.' Again, on Knut ii. 37: 'Let him forfeit his halsfang (10s.) to the king or to the manorial lord, who has his soc.'

the procedure of the hundred, and, like the hundred court, it was controlled by the shire court.

It is wrong to suppose that, after the Conquest, a foreign system of law was violently imposed on the inhabitants of the conquered country, or, indeed, that William was a great law-maker. He was not, nor did he profess to be. He expressly declared that all men were to enjoy the law of King Edward, which they enjoyed before he invaded the country. We have, in the late Bishop of Oxford's *Select Charters*¹, those Statutes of William the Conqueror in a MS. attributed to the time of Henry I, which probably contained all his legal enactments; and an examination of them shows that they were, if we may use the expression a little loosely, rather measures of police and administration than the making of new law. He says that Normans and English are to be within his peace: that every one is to swear fealty to him: that Frenchmen who have come with him from Normandy are to be specially protected, and, if they are killed, there is to be a fine on the hundred in which they are found². Every freeman is to have pledges bound to produce him if necessary: every one is to enjoy the laws of King Edward, even those Frenchmen who lived in England in the time of King Edward. If a Frenchman appeals an Englishman of certain grave offences, the Englishman may defend himself by the ordeal of iron or by battle, and if he is feeble he may find a champion. If an Englishman appeals a Frenchman, and does not wish to prove his case by ordeal or battle, the Frenchman can purge himself by unbroken oath. Capital punishment is abolished³. No one is to be

¹ Stubbs, *Sel. Ch.*, pp. 83-85.

² By the time of Henry I every dead man is presumed to be French, unless his Englishry is proved. A very neat doctrine for Revenue purposes, as the records show, for if a stranger is found dead, who can prove that he is English?

³ This was not so humanitarian as it looks. The king's courts issued

sold out of the country, and the sales of live beasts must be attended by certain formalities.

One great and far-reaching change was introduced by William. He separated the lay and the spiritual jurisdictions¹. He prohibited bishops and archdeacons from holding the pleas of ecclesiastical discipline in the hundred courts; such pleas must be judged not according to the hundred, but according to the canons and the episcopal laws. He forbade any sheriff, or royal minister, or any layman, to meddle with ecclesiastical matters. No canon was to be enacted, and none of his barons were to be excommunicated without his leave².

The New Feudalism.

The Norman Conquest is an important stage in our history, for it was the moment for receiving a new political idea, and for introducing new methods of administration. The new political idea was feudalism, and it was feudalism with the fangs drawn. William, it cannot be doubted, was a man of high political capacity. He was king in England, while in Normandy he was a great feudatory. He knew the feudal system from both sides, its strength and its weakness.

The Continental Fief.

The fief, historically regarded, was a fragment of the empire of Charles the Great, which, in the time of his feeble successors, broke off and set up for itself. It was in its essence a military group, in which the lord had the right to summon by his 'ban' his immediate vassals to the wars. But, according to the notion prevalent on the Continent, although he was entitled to summon his own vassals, he could not summon the vassals of his vassal. To use the language of the period, although he had the 'ban,' he had not the 'arrière ban.' Thus the Carlovingian sovereigns were only able to call out their great vassals, the lords of

in the course of a year many 'human documents' blinded and mutilated to proclaim the royal justice.

¹ Stubbs, *Sel. Ch.*, p. 85.

² Ibid., p. 82.

the great fiefs, that had been granted on condition of military service. At the same time the lord, although a military leader, presided in his court, in which was administered the law of the fief. The power of these great feudatories became so formidable that the successors of Charles the Great failed to keep them in hand, and the weakness of the system, in which the empire consisted of a great number of what were really smaller independent kingdoms, was exposed when the Huns swept down and attacked them in detail. Self-preservation made it necessary to revert to the monarchical idea. It was almost inevitable that when firmly settled the new kings should attempt to take in hand justice and police. These great leaders were also great feudatories. They had great estates of their own, and on their own demesnes they discharged judicial as well as military functions ; any disputes arising on the demesne must be settled and judgement must be given, in the court of the fief, where the vassals are ‘pares curiae.’ The lord, it is true, presides, but the judges are the body of his own tenants. He naturally endeavours to apply the theory of the Fief to the Kingdom. The effort was a failure in Germany, and it made very little headway in France, but in England it was marked by entire success. The conditions were indeed favourable. England was an entire fief, obtained by conquest, and the advantages of its geographical position could hardly be surpassed.

William, when he exacted the oath of fealty from all ‘land-owning men of property’ at Sarum¹, freed himself from the difficulty under which the Frankish sovereigns laboured. By virtue of that oath he had the *arrière ban*, and he could call upon all the freemen in this country, of whatever lord they were the men, to come and serve him on his summons. But that was not all. One thing is very

¹ Stubbs, *Sel. Ch.*, p. 82.

irksome to the subject, and that is a liability to military service, which may be enforced at uncertain times at the command of the king. One thing the State is always ready to receive, to wit money. It is an arrangement agreeable to both parties that the State, in consideration of receiving cash, shall allow the subject to rid himself of a very unpleasant duty, and this was perceived as long ago as the time of Pericles. So when Ralph Flambard, the Justiciar, took the ten shillings¹, the 'viaticum' which the shires had provided, from the twenty thousand men who had come down to Hastings to serve the king abroad, and then excused them from further attendance, the time was foreshadowed when, under the name of 'scutage'², it became the ordinary rule to redeem personal service in the army by the payment of money.

William very soon saw that he might be met with the same difficulties which had so much troubled his Frankish colleagues, for he was bound to reward the successful soldiers, who had helped to found his kingdom in England, and yet if he should make great grants of territory the donees would almost certainly set up pretensions fatal to the consolidation of the royal power, and William had no time to spare for reducing his own creatures to subjection. He combined generosity and prudence, he gave his followers estates, but they did not lie all together, but were scattered in different parts of the country.

The Frankish kings, in order to diffuse the king's law, had conferred portions of the royal jurisdiction on their great feudatories, who had taken advantage of the weakness of the central government to make a jurisdiction, which was originally royal, private and personal. William avoided this danger by creating no new jurisdictions, but using the existing machinery. The hundred court, the manor court,

¹ Stubbs, *Sel. Ch.*, p. 153.

² *Ibid.*, p. 129.

and the shire court, remained the only ordinary courts in his reign, and the king took notice that none should have more 'sac' and 'soc' than had been enjoyed in the time of his predecessors.

But it is interesting to notice that, although the sagacity of William relieved him from trouble on the score of the military summons, a precisely analogous difficulty was raised by the barons under his successors with regard to the judicial summons. The vassal's vassal must, they said, answer in the court of his lord, and not in that of his over-lord¹.

The eventual failure of this claim is an incident in the victorious advance of the Royal Justice.

¹ *Mag. Ch.*, § 34. *Stubbs, Sel. Ch.*, 301.

CHAPTER V

THE KING AND PROCEDURE: THE INQUEST

Early
Pro-
cedure.

Battle.

Ordeal.

Witnesses
and com-
purga-
tors.

THOUGH the courts remained unaltered, a great step was taken in the improvement of the administration of justice and procedure. The Anglo-Saxon forms of proof were ordeal, compurgation, witnesses, and charters: judicial combat cannot be discerned before the Conquest. Professor Maitland considers that combat existed, but was extra-judicial—an opinion which Mr. Bigelow seems to share, and doubtless we are safe in considering combat as ‘regularized’ blood-feud procedure. The Normans, however, were quite familiar with the duel as a judicial method of proof, and introduced it into England, although, as we have seen, William did not force this procedure on his new English subjects. Ordeal was frequently used in criminal cases down to 1184¹. But in Henry II’s time there is no record of it being used in civil cases, and it did not in any form survive the condemnation of the Lateran Council in 1215. Witnesses were used in Anglo-Saxon times for party proof, and must be distinguished from compurgators. The compurgators swore to the credibility of the party, not to the facts; the witnesses spoke to facts ‘de visu et auditio,’ and employed a set formula. The witness appears and thus makes oath:—‘In the name of Almighty God as I here for N. in true witness stand, unbidden and unbought, so I with my eyes oversaw, and with my ears overheard, that which I with him say.’ The oath of the

¹ See Pl. Ang.-Nor., pp. 231, 233.

compurgator on the other hand was, ‘By the Lord the oath is clean and unperjured which N. has sworn.’

The witness, although he testified to facts, only swore to the assertion of his chief, and unless produced by the party, could not give evidence, however much he knew of the case, and when produced was confined to the formula prescribed by the interlocutory judgement by which the burden of proof and the subject of proof were declared. For in the Germanic courts judgement came first and evidence after¹. Charters Charters. were always used if they existed, and excluded all other evidence except that of witnesses², though they might be supported by other testimony, especially if they were in a dilapidated condition³. Compurgation was permitted up to 1166, the date of the Assize of Clarendon, to disprove accusations of crime⁴. After that date, if an accusation was presented by inquest, the accused man had to clear himself by ordeal. All these methods, however, were fated to disappear before an institution which was introduced by the Norman king. That institution was the ‘inquest.’

The Inquest was a royal and privileged procedure unknown to, and not exercised by, the courts of the clan or the fief. It was not purely judicial in its nature, but it was useful in all sorts of public business and was much employed by Charlemagne and his successors to discover the property of the fiscus⁵. They sent Commissioners, ‘Missi,’ to inquire on the spot, and the neighbours were summoned and compelled to swear, whether they liked it or not, whether or

Recognition by
Inquest.

¹ Cf. the formulary procedure at Rome.

² *Abbot Athelhelm v. Officers of the King*, Pl. Ang.-Nor., p. 30.

³ Cf. Pl. Ang.-Nor. 27, ‘per cartas suas et per testes suos,’ and ibid. 2, ‘iusto dei iudicio ac scriptis evidentissimis detritis et penitus annihilatis.’

⁴ Vide the curious case of Matilda, Pl. Ang.-Nor., p. 79.

⁵ The Capitulary of Louis le Debonnaire says that all fiscal inquiries are to be made in this way (*Anc. Lois Franc.*, i. 69).

no there was any Treasury property in their part of the world.

The Inquest, due seemingly to the invention stimulated by the royal fiscal necessities, was soon perceived to be an admirable weapon for the discovery of truth and fact of all sorts. Local knowledge was made available to inform the royal mind at a time when the Government was unorganized and communication difficult. Indeed, when the Conqueror set about compiling that great revenue book, which we know as Domesday, his business capacity selected the Inquest as the true method for ascertaining what it was essential for him to know¹.

So useful a procedure was not likely to be long confined to one sort of inquiry.

The Frankish kings used the Inquest in their law-suits in preference to other methods of trial. They preferred the verdict of the neighbourhood to battle or ordeal. A procedure which they found so trustworthy themselves, they were ready to grant as a favour to others, and, it is hardly necessary to say, granted it in return for payment.

Battle in England was exotic and unpopular ; the ordeal was, for reasons good or bad, not trusted ; and the procedure by oath-helpers gradually came to be regarded as unsuitable to the serious administration of justice.

In England we find the king employing procedure of the Inquest in his own business. It is used for the ascertaining of royal rights, and for the discovery of royal property. The king can direct it to be used on any occasion he chooses, and he allows it to favoured churches². It immediately comes

¹ See the Title of the Domesday Inquest for Ely (Stubbs, *Sel. Ch.*, 86), 'Not even an ox nor a cow nor a swine was there left which was not set down in his records,' says a Saxon chronicler.

² E.g. to the Abbot of St. Augustine, Pl. Ang.-Nor., pp. 33, 66, to

into use in litigation, although the occasions when it is employed are at first exceptional.

As it is good to see the actual words of legal documents, a writ ordering an Inquest is appended, which, with many others of the greatest interest, has been printed by Mr. Bigelow. The Abbot of St. Augustine had complained that his ship had been taken from him.

‘Willelmus filius regis Willelmo vicecomiti de Kent salutem. Praecipo quod praincipias Hamoni, filio Vitalis et probis vicinis de Sandwich, quos Hamo nominavit ut dicant veritatem de nave abbatis de Sancto Augustino, et si navis illa perrexit per mare die qua rex novissime mare transivit, tunc praecipo ut modo perget quousque rex in Angliam veniat et interim resaisiatur inde abbas praedictus. Teste episcopo Sarum et cancellario apud Wodstoke.’

The ‘vicini’ having found in favour of the Abbot, a writ comes down from Windsor ordering the sheriff to put the Abbot back in seisin of his ship, ‘sicut recognitum fuit per probos homines comitatus.’

The Inquest could also be used in combination with the judicial session of the shire. The following cases may be compared.

In the case of *Archbishop Lanfranc v. Bishop Odo*¹, in 1071, there was a writ and an action for the restitution of lands, in which the plaintiff recovered many manors and franchises, and elucidated many ‘consuetudines.’ The case was heard before the shire at Penenden Heath, there being summoned all the French, and especially the English, who were skilled in the old laws and customs. The Bishop of Coutances presided as justiciar, and the shire gave judgement. Here no inquisition is mentioned.

Bishop Robert, p. 139, to the Church at Ely, p. 24; and cf. P. and M. i. 122.

¹ Pl. Ang.-Nor., p. 4.

In the case of *Bishop Gundulf v. Pichot*¹, the judgement of the shire is given first, and the presiding officer, the Bishop of Bayeux, being dissatisfied, it is directed to choose twelve to confirm the judgement on oath.

In the case of the *Monks of St. Stephen v. The King's Tenants*², an inquisition of sixteen swear, and then seven hundreds presided over by the sheriff give judgement accordingly.

In the case of the *Church of Ely*³, a Court is held of three counties, and an Inquest of Englishmen who know the facts is directed.

The Inquest was a royal procedure, for none but the Crown could compel witnesses to take an oath (see 52 H. iii. c. 22); it was the finding of facts by impartial men, generally, if not always⁴, on oath, and examined by an officer of the law acting under the king's writ. It was required to be unanimous, and if it could not agree after being afforced, it apparently failed.

¹ Pl. Ang.-Nor., p. 34. ² Ibid., p. 120. ³ Ibid., p. 16.

⁴ But see the case of *Bishop Robert v. Lord of Stow*, Pl. Ang.-Nor., p. 139. The royal writ orders an inquest 'per probos homines de comitatu' as to boundaries, 'et si bene eis non credideritis sacramento confirment quod dixerint.'

CHAPTER VI

THE NORMAN COURTS OF JUSTICE. ROYAL AND LOCAL

AFTER the Norman Conquest we find the following courts, leaving out of account the ecclesiastical courts: the Great Council or the Witenagemot, the King's Court, the Exchequer, the County Court, the Burghmote, the Hundred Court, the Manorial Court, the Forest Court. Some confusion arises from the fact that in our sources the term Curia Regis is used of the Great Council, the King's Court, and apparently of the County Court on certain occasions.

The expression Curia Regis means, when used in its narrowest sense, those great assemblies of the nation, on the three great feasts of the Church—Easter, Pentecost, and Christmas—‘when the king wore his crown¹.’ It also meant an assembly of all the king's great men ‘congregatis in aula regali primoribus regni².’ It was also applied to a meeting

The Curia Regis.

¹ Stubbs, *Sel. Ch.*, p. 81.

² *The King v. Earl Odo*, Pl. Ang.-Nor. 291. This was the remarkable case in which William accused his half-brother Odo, Bishop of Bayeux and Earl of Kent, whom he had left as Justiciar of England during his own absence on the Continent, of treason and abuse of office. The king, addressing the assembly, concludes thus: ‘Et frater meus cui totius regni tutelam commendavi violenter opes diripuit, crudeliter pauperes oppressit, frivola spe milites mihi surripuit, totumque regnum iniustis exactionibus concutiens exagitavit: Quid inde agendum sit caute considerate.’ The assembly, however, was a little shy of offering an opinion against so great a per-

for business of the king's household or personal attendants, and to the county court, when either the itinerant justice went down to it or sometimes when the sheriff presided, in the king's name, on the king's business¹.

The King's Court, in the sense in which the expression is most usually employed, was a smaller body of great men who usually surrounded the king, and who belonged, of course, to the Great Council. It represented the king, and if the king was not there in person he was there in theory².

The Ex-
chequer.

The first department which appears in the Curia Regis is the Exchequer which, under the first two Norman kings, is called 'the Treasury' or 'Thesaurus' and which was concerned with the due collection of the royal revenue. The source of our information on this point is the *Dialogus de Scaccario*³. From it we find that till Henry I's reign payments were made to the Treasury not in gold or silver, but in kind: 'non auri vel argenti pondera sed sola victualia solvebantur.' But for the king's foreign wars money was needed, the system lent itself to exaction, and seasons were often bad⁴. Henry accordingly fixed a money payment in commutation, which was to be paid by the estates liable,

son: and noticing this the 'magnanimus rex ait, Hunc virum, qui terram turbat comprehendite,' and when no one dared to move, the king himself arrested him, 'rex ipse primus apprehendit eum.' And when the bishop cried out 'clericus sum, et minister Domini,' and that as a bishop he could not be condemned without a judgement of the pope, the king, 'providus rex,' shrewdly answered that he was condemning not the prelate, but his own earl, whom he had placed over his kingdom: and sent him to prison where he stayed as long as William lived.

¹ See P. and M., vol. i. p. 132; and Bigelow, *Hist. of Proced.*, pp. 21 sq.

² Case of the Abbot of Leicester, Abb. Plac. 2 John, 32.

³ See Stubbs, *Sel. Ch.*, pp. 168 sqq.

⁴ When the king was travelling the inhabitants used to meet him, offering their ploughshares, 'in signum deficientis agriculturae.' Stubbs, *Sel. Ch.*, pp. 193-4.

and the sheriff of the county was to account ‘ad Scaccarium.’ The barons sat one side of the chequered table, the sheriff on the other, and thus was played the game of exchequer chess described in Mr. Herbert Hall’s book¹. The justiciar presided *virtute officii*, the chancellor, who kept the king’s seal, being also present. The table was covered with a cloth ‘which is of a black colour rowed with strekes distant about a foot or span.’ On these spaces were placed the counters, with marks denoting their value. As no doubt the same great men sat in the Exchequer that sat in the King’s Court, it gradually took hold of judicial work. In Henry I’s time we find it taking common pleas.

The action of the men of *Periton v. the Abbot Faritius*², about 1109, which was for the recovery of a manor, was tried in the Exchequer before three bishops and many barons. The Queen’s writ uses the words ‘in curia domini mei et mea apud Wintoniam in *thesauro*.’ It is suggested by Mr. Bigelow³ that the reason for trying a case of this sort in the Exchequer was that in it was kept *Domesday Book* or the *Liber de Thesauro*, which in this case was referred to on the question of title. In the case of the *Abbot of Westminster v. Certain Men*⁴ in the same reign, the writ to the Bishop of London directs him to do right to the Abbot of Westminster for a trespass ‘et nisi feceris barones mei de *Scaccario* faciant fieri ne audiam clamorem inde pro penuria recti.’

That it was a matter of favour or at any rate a privilege to get one’s case tried before the Exchequer is probable from an entry of the eighteenth year of Henry II, in which it is said that Robert the son of Ernusus owes five marks for having his plea, which is between him and Hugo Malebisso,

¹ *Antiquities of the Exchequer*, 1891.

² Pl. Ang.-Nor., p. 99.

³ *Hist. of Proced.*, 127.

⁴ Pl. Ang.-Nor., p. 127.

before the Justice ad Scaccarium¹. A successful plaintiff in the Exchequer was sometimes permitted to use the summary process proper for collecting crown debts. It has been suggested that, as there was as yet no distinct court of common pleas, the provision in Magna Charta that the common pleas should no longer follow the king was aimed at depriving the Exchequer of the litigious work which they had usurped. If that was the object it was hardly attained, for Edward I, in the Statute of Ruddlan, 10 Edward I, prohibited the Exchequer from entertaining common pleas on the ground that this hindered them from attending to their proper business, which was the care of the King's revenue. 'But for so much as certain pleas were heretofore holden in the Exchequer whereby as well our Pleas as the causes of our People are unduly prorogued and letted, we will and ordain that no plea shall be holden or pleaded in the Exchequer aforesaid unless it do specially concern us and our ministers aforesaid.' It is just as probable that as the Exchequer sat in London, at least during its two financial sessions if not permanently, litigants preferred to go there rather than 'follow the court' on progress. England was divided into counties, counties into hundreds, in which there were 'vills' or townships. The County and the Hundred had courts.

The
County or
Sheriff's
Court.

The County Court was of Anglo-Saxon origin, and continued under the Norman Kings. In Saxon times it met twice a year². The rule is the same in the time of Henry I³. But the second reissue of Magna Charta, § 42, A.D. 1217, says that the county court is not to be held oftener than once a month⁴. There is high authority⁵ for the view that there was a combination of Anglo-Saxon and new Norman practice, and that the county court was in Henry III's time

¹ Pl. Ang.-Nor., p. 271. So also case of Robert de Hasting, 14 Hen. II. Ibid., p. 269.

² Laws of Edgar, iii. 5.

⁴ Ibid., p. 346.

³ Stubbs, *Sel. Ch.*, p. 105.

⁵ P. and M., i. 526.

held twelve times a year, but that whereas two meetings were of greater importance, most if not all freeholders owing attendance at them, the others were of less account. The county also assembled to meet the justices in eyre, who came once every seven years, and then, it is conjectured, every one was expected to attend¹. But this is largely speculation. The king also claimed the power to summon the local courts at his pleasure². As attending courts, or making suit (*facere sectam*) was a burden, we can only surmise that few attended that were not bound to do so. And if it is asked who were bound, the answer is that the land was bound to provide suitors, so much land a suitor, but that between the lord and his freehold tenant, it was a matter of private arrangement or of tenure who should do suit for the whole. It is believed that perhaps in virtue of franchises of exemption the suitors were divided into two classes, the one to go every month, the other only twice a year³. In the ‘laws of Henry I,’ at a time when the meetings were twice a year, it is said ‘intersint episcopi comites vicedomini vicarii centenarii aldermanni, praefecti praepositi barones vavasores tungrevii et ceteri terrarum domini⁴.’ Also there came the priest, the reeve, and the four best men of the ‘vill,’ to acquit the vill of its suit if the local baron and his steward could not attend⁵. The reeve and the four men also came when they had crimes to present.

When the itinerant justices came they sat in the County Court: they could sit nowhere else, as the county was their sphere of jurisdiction. To meet them the shire assembled with its fullest representation. The private jurisdictions and the franchises of exemption counted for nothing, and in

¹ P. and M., i. 531.

² Cf. Henry’s writ to Bishop Samson. Stubbs, *Sel. Ch.*, p. 104.

³ P. and M., i. 526.

⁴ This last phrase may perhaps mean all freeholders.

⁵ Stubbs, *Sel. Ch.*, p. 105. *Leges Hen. I. 7, §§ 2, 3, 7.*

addition to the persons above named, the chartered boroughs which owed no suit to the County Court sent their twelve legal men¹.

The court had an original jurisdiction in personal actions, real actions came to it when the feudal courts made default in justice; it is disputed whether an appeal lay to it from the Hundred Court on similar ground². It also had an original jurisdiction where the vassals of two lords were litigating ‘de divisione terrarum’³? It was only in that court that a man could be ‘exacted,’ and that outlawry could take place. The sheriff was the president, but the suitors make the judgements, which the sheriff announces.

If a case was of great importance several shires could be summoned⁴.

The Burghmote was a County Court established in a borough which had municipal privileges of its own.

The Hundred or Wapentake Court met originally once a month⁵, but a Royal Ordinance of 1234⁶ declares that it is to meet but once in three weeks instead of every fortnight as heretofore. The practice had at some period changed. Here again we are in doubt as to who attended these numerous sittings. We must be content to say that those free-holders of the hundred came who were bound to come and do suit. The number might be very small, sometimes as low as twelve⁷. The hundred tried personal actions ‘causae

¹ In 1259, by the further Provisions of Oxford, the bishops and barons were excused attendance at the county court. But so imperceptible had been the change from local to royal justice that the great men of the county thought they had a right to sit on the bench at the Assizes. This was forbidden by 20 Ric. II, c. 3.

² Cf. Bigelow, *Hist. of Proced. in Eng.* 135, and P. and M. i. 544.

³ Stubbs, *Sel. Ch.*, p. 104.

⁴ *Bishop Odo v. Walter of Evesham.* Pl. Ang.-Nor., p. 20.

⁵ Edgar, i. 1. ⁶ Stat. i. 118. ⁷ See P. and M., i. 544.

The
Burgh-
note.

The
Hundred
Court.

singulorum¹, and appeals ‘de pace regis infracta,’ probably of a small sort². It was presided over by the bailiff.

Twice, however, in the year the sheriff held a full Hundred Court, when, according to the Laws of Henry I, all free men are to be present³ to ascertain inter cetera if the tithings or ‘decaniae’ are full, in other words, to hold a ‘view of frank-pledge.’ In practice it seems to have been enough if the head men were present. The sheriff at the same time made inquiries as to crimes committed since his last visit, and each vill in the hundred appeared by its reeve and four men, and presentments were made⁴ in answer to the sheriff’s set questions, known as the ‘articles of the view,’ of a character similar to the ‘articles of the eyre.’ The hundred had to provide a jury of twelve at the least who confirmed or rejected the presentments. The smaller offences were then summarily dealt with by the sheriff, by fines, which were ‘affeered’ by two of the suitors. The graver crimes were kept for the king’s justices, the sheriff arresting the accused persons. Meetings of this character were at a later date known as the ‘Sheriffs Turn.’

The Manorial Court was of the same rank as the hundred courts. In it, in virtue of a jurisdiction inherent in the feudal relationship of a lord and his tenants, were triable personal actions at least of the value of 40s., debt, detinue, trespass and covenant, slander and libel, and actions affecting land of the manor⁵. It had frequently a criminal jurisdiction, but the extent of its jurisdiction varied, and depended on the royal charter which conferred the jurisdiction; or, in the absence of a charter, on the long-established practice of the court. In some cases these

The Sheriff's Turn.

The Court of the Manor.

¹ Stubbs, *Sel. Ch.*, p. 105. *Leges Hen. I.* 7, § 8.

² 1 *Rot. Cur. Reg.* 205, 207.

³ Stubbs, *Sel. Ch.*, p. 105. *Leges Hen. I.* 8, § 1.

⁴ Cf. Assize of Clarendon. Stubbs, *Sel. Ch.*, p. 143.

⁵ See P. and M., i. 574.

baronial franchises were so extensive as to found a claim for excluding even the king's justiciar¹.

The Writ
of *Quo
Warranto*.

It was not till the reign of Edward I that the jurisdiction which remained in the manorial courts was seriously questioned. By means of the statute of *Quo Warranto* the Crown called on every one to show title for liberties that they claimed; and the Crown lawyers distinguished between *libertates* and *regalia*. These latter, such as view of frankpledge, could only be held by royal grant; the others, such as jurisdiction over manorial offences, e. g. ploughing badly, flowed from tenure. In the face of violent opposition Edward compromised in 1290, and agreed that continuous exercise from before the coronation of Richard I should be a good answer. But his action stopped further encroachments. The writ was as follows²:

‘Rex vicecomiti salutem. Summone per bonos summonites tales quod sit coram nobis apud tales locum in proximo adventu nostro in comitatu praedicto vel coram iustitiariis nostris ad proximam assisam cum in partes illas venerint ostensurus quo warranto tenet visum franciplegii in manorio suo de N. et habeas ibi hoc breve.’

The
Forest
Courts.

There remain the Forest Courts. The woodlands, with extensive additions, had been enclosed by the Conqueror and his sons, and rules for the protection of them and the beasts

¹ We find in the rolls of the King's Bench in the time of Richard I, in a case where Agnes de Bascoville demands the castle of Bredewardine, in her right and inheritance of which Robert de Wastre deprives her, the Sheriff of Hereford is ordered to take the castle into his hands. He says it is out of his bailiwick, and he dare not meddle, and ‘William de Braosa says that neither king, justice, nor sheriff, ought to lay their hands on his franchise. The case is adjourned *sine die* till the pleasure of our lord the king is known hereon’ (*Palg., Rot. Cur. Reg.*, i. 426).

² At the present day the procedure is by motion for an order *nisi*, calling on the defendant to show cause why an information should not be exhibited against him to show by what authority he exercises the particular office or franchise.

of the forest, ‘cruel to man and beast¹,’ had been made, notably by Henry I. No records tell us the details of the forest jurisdiction at its commencement, but the whole matter lay outside the ordinary law, and the justice administered was summary and, if we may draw an inference from its unpopularity, harsh and without much redress. Its aim was the preservation of vert and venison. The Selden Society has recently published a volume of *Pleas of the Forest*², beginning in the tenth year of John, to which the learned editor has written a full and admirable preface, showing, amongst other things, what the forest system was when it became settled. In 1238 there were two justices of the forest, one for the north of the Trent, one for the south. Hitherto there had usually been one official, the *capitalis forestarius*³. Their duties were mainly ministerial, their chief function being to decide on the release on bail of offenders against the forest rules. Such persons could only be released by them or by the king. Under them came the wardens of the various forests, who were the executive officers of the king, and who were the recipients of his writs; there were also verderers, knights or men of substance elected in the county court and responsible to the king, their duty being to attend the forest courts; then there were the

¹ *Stubbs, Sel. Ch.*, p. 156.

² *Select Pleas of the Forest*, ed. J. F. Turner.

³ See the case of *Abbott Walter v. Alan de Neville* ‘qui praeverat domini Regis forestarii.’ Alan was a bad man vexing all England ‘innumeris et insolitis quaestionibus. Nec deum nec homines verebatur,’ and among other iniquities he had forcibly collected monies on the lands of Battel Abbey for clearings (‘vi exegit’). The money had been paid into the exchequer, but was recovered by the Abbot who produced charters to the court. Alan does not seem to have been disturbed, and the office remained in his family. The monkish chronicler says that, on the death of this valuable servant, when a certain monastery sought a portion of his goods, the king said ‘I shall have his wealth, but you may have his carcass, and the devil may have his soul.’ Bigelow, *Hist. of Proced.*, p. 146 n.

foresters (who were gamekeepers, and who paid for their offices and repaid themselves by extortion under the name of customary payments), the regarders and the agisters.

In the forest 'attachment' courts were held. If the forest contained more than one bailiwick, each had its court and four verderers, and the court met as a rule every forty-two days. These courts were of little jurisdiction: they could not inquire into cases of venison but only into minor offences against the vert, for which the offenders were duly amerced. If there was a serious trespass to the vert, the offender, if an inhabitant of the forest, was put under pledge to appear at the first eyre, if a stranger, he went to prison, whence he could only be bailed by a justice, or by the king.

When a trespass had been committed to the venison, e.g. when a beast of the forest was found dead or wounded, there were special forest inquisitions of the four neighbouring townships before the verderers and foresters. The accused was either sent to prison or attached to appear before the justices in eyre, the four towns and suspected persons being attached also.

After 1306 an institution recognized by statute and known as a general inquisition or a 'swanimote' becomes settled. This was held before the justice of the forest or his deputy, and was made by the forest officers and a body of jurors in respect of such offences as had recently been committed. These inquisitions were held at no fixed intervals, and probably at the pleasure of the justice.

The Forest Eyre was held under letters patent appointing justices to hear and determine pleas of the forest in particular counties. To it were summoned all, great and small, having land in the forest, the reeve and the four men, the verderers and foresters, with all the attachments. In the time of Henry III seven years seems to have been the proper interval, but it gradually became longer. Its business had

a strongly financial aspect, being mainly concerned with amercements levied for forest offences, and for wrong or insufficient presentments. If offenders failed to appear they were 'exacted' and outlawed in the county court.

The royal justice was still mostly extraordinary, and by that is meant that the king's court was not to be approached except by way of appeal and in the last resort. This had been so in Anglo-Saxon times, for we find in the ordinances of Edgar 'let no one apply to the king in any suit unless he at home may not be worthy of law or cannot obtain law : if the law be too heavy let him seek a mitigation of it from the king'¹. So again in the Secular dooms of Canute, we find 'and let no one apply to the king unless he may not be entitled to any justice within his hundred'², or in the Latin form in which it appears in the laws of the Conqueror, chap. xlivi, 'Nemo querelam ad regem deferat nisi ei ius defecerit in hundredo vel in comitatu.'

Although the king's court was, for ordinary people, a court of last resort, certain persons went there in the first instance. The great nobles, bishops, and archbishops disdained the jurisdiction of a court presided over by some one very much inferior in rank to themselves. It is suggested that the clause in Magna Charta concerning 'iudicium parvum' was really due to the dislike of the great barons to come into a court presided over by the royal judges, who were, apart from their official position, persons of no great account. It was moreover good feudal doctrine that no one was bound to answer in any court but the court of his own lord. These great nobles were all tenants of the king ; and to the king's court they naturally resorted. The king's court may be said truly to be 'the court of great men and of great causes.'

Royal
Justice
still
usually
extra-
ordinary,

but some-
times
ordinary

¹ Stubbs, *Sel. Ch.*, p. 71.

² *Ibid.*, p. 73.

CHAPTER VII

THE DECLINE OF THE LOCAL COURTS. THE ROYAL WRIT PROCESS

Rise of a
'common
law.'

THE period which lies between William I and Edward I was the time during which the royal justice gradually dwarfed and finally superseded all other justice, with the result that there was produced a common law of the land. The time had come for Wessex, Mercian, and Dane law, to give place to the common law of England ; and, with the exception of the customs of Kent, the one surviving custom was the custom of the king's court.

'Pleas
of the
Crown.'

The king's court had comparatively little original jurisdiction for some time after the Conquest. It was the court for great men and great causes, and it also took cognizance of what are called 'pleas of the Crown.'

The local courts could nominally entertain all pleas *exceptis excipiendis* as Mr. Maitland says, i. e. those which the king reserves.

The list of pleas of the Crown was uncertain and irregular. In the laws of Henry I, chap. x, *De Iure Regis*, we find, 'Haec sunt iura quae rex solus habet in terra sua, commoda pacis et securitatis institutione retenta infractio pacis regis, murdrum, utlagaria, incendium, robaria, iniustum iudicium, defectus iustitiae,' but the list was not constant. We know that thefts, scuffles, blows, and wounds, could be dealt with in the county court on appeal from the hundred

or the manorial court¹. Civil actions, except those arising between great men, were tried in the local courts.

The chief instrument for bringing about the supremacy of royal justice was the ‘Writ.’ The king’s writ, it has been happily suggested by Mr. Jenks, is the descendant of the royal Ban. It was the king’s order to his liege, written on parchment and sealed with the royal seal, and disobedience to the writ was a contempt of the royal authority, and entailed penal consequences. The writ, like the inquest, was originally used for royal purposes, and to protect the royal interest; but, like the inquest, this efficacious weapon was purchasable by the subject, and the advantages of getting it were found to be so great that it has superseded all other processes, and remains in use to the present day. The writ, moreover, being a written document, could be registered. The king’s officer kept a register of the writs issued; and this register was available as a book of precedents, though it need not be supposed that the early writs were classified with any exactness.

The king, in the Norman times, took a personal part in the administration of justice. He sat in court himself, and he issued his orders to vassals and subjects in the full expectation that they would be obeyed. It is very doubtful if we can consider the writ as being at first judicial. It is perhaps safer to regard it merely as a royal command. There was a large number of writs and mandates by which the sovereign directed the performance of any desired act by the subject. They issued irrespective of intervention by the courts, and have now become obsolete. But it seems that the term ‘mandamus,’ derived from these letters missive, was gradually confined to the writ issued from the King’s Bench, which has developed into the present prerogative writ of mandamus.

At first
not judi-
cial.

¹ Glan., lib. 1, c. 2.

From the precedents we may infer that these commands were of all sorts, and it never seems to have occurred to anybody that the king's writ was insufficient on any ground, or that it could safely be disobeyed. The king is the fountain of justice, his word is law, and his writs settle the rights of men. He writes to the sheriff 'Volo et praecipio,' and the sheriff does what he is told. *A* is to hold certain lands: if any one turns him out the sheriff is to put him in again¹, *B* is to be free of customs². *C* is told to perform customary services of his land to *D*; if he does not, *D* is to be allowed 'suam voluntatem facere'³. Strangers are not to go fishing in certain places on the Thames⁴. The king orders fugitives,—whenever found,—from the Abbot of Abingdon to be restored⁵. Abbot Simeon is to have soc and sac as his ancestor had⁶. Bishop Remigius, on the other hand, is prohibited from having any new customs below the island of Ely⁷, 'For I will not that he have any but those which his predecessor had in the time of King Edward.'

A curious case is that of *Modbert v. the Prior and Monks of Bath* (1121)⁸. The writ, or as it is called, 'literae cum sigillo regis,' comes down to the Bishop of Bath. The king is abroad, so his son sends the writ. 'Willelmus filius regis Iohanni episcopo de Batha salutem. Praecipio ut saisias Modbertum iuste de terra quam tenuit Grenta de Stoca, sicut haereditavit eum in vita sua.' The plaintiff said that he was the adopted heir of the late owner, and so was entitled to the land. The defendants said that the dead man was only a tenant for life under them, and surrendered before death. They produced witnesses, and also a charter. The bishop apparently observing the word 'iuste' in the writ, says that he agrees, and will obey the writ 'si tamen iustum est,' and proceeds to try the case to see if it is just. The

¹ Pl. Ang.-Nor., p. 108.

² Ibid., p. 74.

³ Ibid., p. 97.

⁴ Ibid., p. 90.

⁵ Ibid., p. 94.

⁶ Ibid., p. 26.

⁷ Ibid., p. 27.

⁸ Ibid., p. 114.

parties contradict each other, a great discussion ensues, and the decision seems far off. The bishop says, 'the day is getting on, and we have other things to do,' and sends apart some who are older and more skilful in the law than the rest. They say the plaintiff must produce either a charter, or two witnesses against interest. He fails to do so, and the court then breaks up. There were present two bishops, three archdeacons, 'cum clericis pluribus et capellanis.' A report of the proceedings is sent to the king, and down comes a writ to the bishop commanding that the monks do hold their land in Stoke, 'in pace et iuste et honorifice,' according to the judgement. This court was held, as many courts were, in a private house.

It is suggested that those writs which resemble in their nature writs of execution, which give us no hint of prior judicial proceedings, and by which the king seised and disseised persons at his will, gave rise to the clause in Magna Charta by which the king promises that he will not disseise or imprison his free subjects unless by the legal judgement of their peers or the law of the land. There is the remarkable case of *The Church of Abingdon v. William*¹, in which one William complained to Henry I that he had been put out of possession of a mill by the late Abbot Faritius, 'quare regis mandato saisiatus est inde'; but afterwards the king, having been approached by the monks, and 'having learned the truth,' ordered the church to be put back in its seisin. In this case it seems quite clear that no judicial investigation had preceded the issue of the writ of the king.

With these data before us, is it unjustifiable to draw the inference that the king it was who, by his mere command, settled the rights of his subjects? It really looks as though these inquests were not an essential part of the process, but that they were used to inform the king's mind as to the

¹ Pl. Ang.-Nor., p. 130.

true state of the facts. In the last case we have no mention of an inquest, but after one writ has been sent down, the monks send Walter *capellanus* to persuade the king that he was wrong; he does so, and a new writ appears. In *Modbert's* case, it seems as if there would have been no inquiry had it not been for the word 'iuste' occurring, which the bishop interpreted as making the order conditional.

The royal justice becomes 'ordinary.'

Such being the general jurisdiction of the various courts, the king having a residuary or appellate jurisdiction, and also a weapon like the writ ready to his hand, the royal authority commenced to encroach upon the inferior tribunals.

The 'staffing' of the local courts.

In the time of William I eminent men had been sent down into the local courts to try important cases, and in later reigns the sheriffs who presided in the shire courts were not infrequently royal justices. A very good man could be made sheriff of more than one county; so we find that sheriff Hugo, in Henry I's time, was not only sheriff of Berkshire, but of seven other shires.

Wrts to the sheriff.

He was 'nominatus vir et carus regi'¹. A writ directed to such a sheriff would be executed with vigour and swiftness. But that was not all: a writ

The 'Praecepit quod reddat.'

called a 'Praecepit' could be directed to the sheriff in any case that raised a question of land wherever lying, or in cases of debts of the laity², and by the time of Glanvill the practice is settled that, if any one complained to the king concerning his fee or freehold, if the complaint were such as was proper for the determination of the king's court, 'vel dominus rex velit in curia sua deduci,' the writ was granted. This was such a grievance to the baronage that a clause in Magna Charta³ appears expressly directed against it, but this policy was reversed by the Statute of Marlborough, ch. 29.

¹ Pl. Ang.-Nor., p. 101.

² As opposed to debts supposed to be of a spiritual nature, e.g. as money due by legacy or on a promise of marriage.

³ Mag. Char., c. 34.

The Praeceptum was a writ returnable, as appears on its face, in the king's court, and it issued regardless of the question whether the local court had done justice or not, or had even been asked to do so. Glanvill preserves the form as follows:—

‘Rex vicecomiti salutem. Praecepit *N* quod iuste et For debt.
sine dilatione reddat *R* centum marcas quas ei debet ut
dicit et unde queritur quod ipse ei iniuste deforciat, et
nisi fecerit summone eum per bonos summonitores quod
sit coram me vel iusticiis meis apud Westmonasterium
a clauso Pasche in quindecim dies ostensurus quare non
fecerit: et habeas ibi summonitores et hoc breve.’
Glan., lib. 10, c. 2.

‘R. v. s. Praecepit *A* quod sine dilatione reddat *B* For land.
unam hidam terrae in villa (naming it) unde idem *B*
queritur quod praedictus *A* ei deforciat et nisi fecerit,
etc.’ Glan., lib. 1, c. 6.

If, however, it was not desired to ‘evoke’ the cause to Westminster, the king could, by issuing a writ of ‘iusticies,’ direct the sheriff to try a case which as mere sheriff he might be unable to try. Under the writ he acted as a royal judge.

‘R. v. s. Praecipio tibi quod iusticies *N* quod iuste et The writ
et sine dilatione faciat *R* consuetudines et recta servitia
quae ei facere debet de tenemento suo.’ Glan., lib. 9,
c. 10.

As this writ was not returnable to Westminster, but stayed down in the sheriff's court, it was called ‘vicontiel.’

Bracton's account is as follows:—

‘Potest quidem vicecomes tenere plura placita quae non sunt ex officio vicecomitis sed vice ipsius regis et ex causa necessaria non sicut vicecomes sed sicut iustitiarius regis si hoc ei specialiter mandetur¹.’

There is given in the *Mirror*² a writ which looks like an

¹ Bracton (Rolls Series), ii. p. 542.

² *Mirror of Justices* (Seld. Soc.), p. 10.

early form of such a special mandate issuing either to a sheriff or lord of a fee.

‘Questus est nobis *C* quod *D* etc., et ideo tibi (vices nostras in hac parte committentes) praecipimus quod causam illam audias et legitimo fine decidas.’

- Writs to the manor court.** The king also sent his writs to the manorial courts of the lords, and these are commands to the lord to do justice to the complainant in his court; and he is told that if he will not do justice,—‘*nisi feceris*,’—the king’s officer shall do it for him. The king’s officer was usually the sheriff.

- The writ of right.** The manorial writs all had the ‘*nisi feceris*’ clause. The most important was the writ of Right (*breve de recto tenendo*), which issued when the right of *property* in land was in dispute, or rights of an incorporeal nature issuing from land, e. g. rent or services. It was directed to the lord or proprietor of whom the land was held, and took its name from the words which commenced the writ. ‘Praecipio tibi quod sine dilatione *plenum rectum teneas N* de decem carucatis terrae.’ ‘Rectum’ means the full right of ‘*property*’ as opposed to ‘*possession*’.

The precedent given in Glanvill is as follows:—

‘Rex comiti *W* salutem. Praecipio tibi quod sine dilatione teneas plenum rectum *N* de decem carucatis terrae in *M* quas clamat tenere de te per liberum servitium (or whatever the tenure was) quas *R* filius *W* ei deforciat. Et nisi feceris vicecomes de *N* faciat ne amplius clamorem audiam pro defectu iustitiae.’ Lib. 12, c. 3.

- The ‘nisi feceris’ clause.** The ‘*nisi feceris*’ clause is not invariably found before the form of the writ becomes settled, when it is always present. It was not always the sheriff who was to act: it might be ‘barones mei de Scaccario faciant fieri’¹, or ‘iustitia mea et

¹ Pl. Ang.-Nor., 127.

vicecomes faciant¹.' Indeed, in one writ directed to the sheriff himself in his administrative capacity ordering the protection of certain rights, it proceeds, 'et nisi feceris iustitia mea faciat².'

The lord is thus made to appear a mere officer of the king; and the fact that Henry II ordains that no one is to be put to answer for his freehold *without a king's writ*, indicates the downfall of the manorial jurisdiction.

According to Fitz Herbert³ the lord might give a licence to his tenant to sue out his writ of right in the king's court, 'remitting his court' for that time to the king's court, whereupon issued the writ 'quia dominus remisit curiam,' returnable before the Common Pleas. If this clause were put in the writ, it became immaterial whether the lord had assented or not. A lord could also adjourn a case of difficulty into the king's court, when, says Glanvill, he was said 'curiam suam ponere in curiam domini regis,' and having got direction there, went back and tried the case in his own court⁴.

The writ
of right
'Quia
dominus
remisit
curiam.'

A writ might be addressed directly to a defendant directing him to do what the plaintiff required, frequently on pain of a fine for disobedience⁵, or concluding with the menacing words 'et vide ne inde amplius clamorem audiam⁶.'

The alle-
gation of
'contra
pacem
Domini
Regis.'

We have mentioned that thefts, scuffles, blows, and wounds were within the jurisdiction of the sheriff or the manorial court, but Glanvill⁷ says, 'to the Sheriff in the county court pertains the cognizance in case of failure of justice in the manorial courts of scuffles, blows, and wounds, *unless the plaintiff allege that the act was "de pace domini Regis infracta."*' This short expression prevented the defendant pleading to the jurisdiction. The result was that if any

¹ Pl. Ang.-Nor. 130.

² Ibid. 256.

³ Nat. Brev. 23.

⁴ Lib. 8, c. 11.

⁵ Pl. Ang.-Nor., p. 95.

⁶ Ibid., p. 93.

⁷ Lib. 1, c. 2.

complainant alleged in his action, criminal or civil, that the wrongful act was done 'contra pacem domini Regis,' the king's court took cognizance of it, and the sheriff's jurisdiction was ousted. So in 1195 an action for carrying off turf 'contra pacem vi et armis' goes to the king's court¹.

¹ Pl. Ang.-Nor., p. 285. Although I follow Mr. Bigelow in this, I am not sure that the example is a good one. The defendant is accused of 'roberia' and 'felonia,' and was thus brought inside the 'pleas of the Crown.'

CHAPTER VIII

THE DECLINE OF THE LOCAL COURTS (CONTINUED).

THE GRAND AND PETTY ASSIZES

THE inferior jurisdictions had yet to feel the full weight of Henry's reforming hand. Proprietary actions (*de recto tenendo*), in which title was litigated, were normally tried in the lords' court, and the normal method of trying them was by battle¹, the defendant in the writ of right putting forward a champion who testified either of his own knowledge, or in obedience to the orders of his dead father to what his father had seen, and who offered to prove by his body. At some date not exactly known Henry issued the Grand Assize², which ordained that when the defendant put in his claim in the lords' court and offered battle, the tenant could, if he chose, decline battle and have the action removed into the king's court, and the whole question of title determined by lawful knights of the shire. The tenant thus 'put himself on the Grand Assize' and escaped the manorial jurisdiction altogether.

The
Grand
Assize.

The procedure was as follows. When the defendant opened his claim the tenant could decline the duel and put

¹ Battle was sometimes prohibited by local usage, e.g. at Ipswich.
Bl. Bk. of Ad. ii. lxxi.

² 'Assisa' means first, an assembly judicial in legislative, next a judgement or ordinance, then it became appropriated to the specific 'assizes,' and was used commonly as equivalent to a 'jury,' as in the expressions 'assisa venit recognitura,' 'assisa vertitur in iuratam.'

himself on the Assize (in *Assisam se posuit*), making a claim for the writ *de pace habenda*, which restrained the defendant from taking further steps in the original process. The defendant was thus remitted to an auxiliary writ which summoned four knights of the county and neighbourhood to choose twelve other knights of the same neighbourhood to swear which had the better title¹. Any that swore that they knew nothing about the matter were discharged; if the ultimate twelve disagreed they were ‘afforced’ till twelve did agree. They swear to what they know by their own eyes and ears, or by hearing it from their fathers, or some equally credible source².

Proprietary actions could also be originated by writ of ‘Praecepit,’ under which they stayed from first to last in the king’s court. This writ when dealing with such subject-matter is known as a ‘writ of right.’

This action, though it finally disposed of the question of title, was very slow, for the tenant in possession might call his warrantor, and he his, and so backwards, and if the tenant was a minor, that fact might hang the suit up for twenty years, when at last it would be settled by battle or by the Grand Assize.

The
Petty
Assizes.
(1) *Novel*
Disseisin.

In 1166 Henry issued the most important of the Petty Assizes, that of *Novel Disseisin*, which provided that if *A* has been disseised of his free tenement by *B* since a certain date unjustly and without a judgement³, he is to be without further question replaced in his seisin. A jury of twelve

¹ There is some dispute whether the four original knights were added making a jury of sixteen. Perhaps this occurred later. Glanvill gives no warrant for the view. For the ceremony of choosing see Y. B. 7 H. IV. 20, 28.

² Stubbs, *Sel. Ch.*, 161. Extracts from Glanvill. The Grand Assize disappeared with the abolition of real actions by the statute of 1833.

³ ‘Unjustly’ here is synonymous with ‘without a judgement.’ No further question of justice was left to the jury.

'legales homines' of the neighbourhood who were to say 'Yes' or 'No' to this plain question of fact were under the original writ summoned directly by the sheriff.

'Assisa venit recognitura si Galfridus Comes de Pertica iniuste et sine iudicio disseisivit Iacobum Clericum de libero tenemento suo in Chaltona post primam coronacionem domini Regis.

Iuratores dicunt quod comes disseisivit eum.

Iudicium: comes in misericordia et Iacobus habeat seisinam suam.'

If they say 'No,' 'non disseisivit eum,' the judgement is 'Iacobus in misericordia pro falso clamore¹'.

By this ordinance *possession* as opposed to *property* is protected by a rapid remedy, and the seisin of a free tenement is protected by the king no matter of what lord it is held.

Although this Assize was originally intended as a remedy for an ejected person, by the end of Henry III's reign it was used as an action for damages for any trespass which the plaintiff chose to call a disseisin².

The object of the Assize is plain. If *B* thinks that *A* has no right to possession, he must bring an action and try the title in a peaceable manner, he must not help himself and turn *A* out.

Ten years later a second possessory or petty assize was issued³, the Assize of *Mort d'ancestor*. According to this Assize if *A* has died seised as of fee, that is, holding possession of a tenement, not as a mere life tenant, or, in other words, as though the title were descendible to his heir, his heir is entitled to be put into possession as against every

¹ (Pipe Roll Series.) Rolls of the King's Court in the reign of Rich. I, xxxii-vii.

² P. and M., ii. 53.

³ Assize of Northampton (1176), c. 4.

man, irrespective of the goodness of his ancestor's title. If *C* has a better title he must go to law and not step in in front of the heir.

'Assisa venit recognitura si Iohannes pater Rogeri de Suttona fuit seisitus in dominico suo ut de feodo¹ die qua obiit de una carucata terrae cum pertinenciis in Westona; et si obiit infra assisam² et si idem Rogerus proximus heres eius sit. Quam terram Thomas de Nortona tenet³.

'Iuratores dicunt quod non obiit inde seisitus [*or* quod Rogerus non est proximus heres suus].

'Iudicium: Rogerus in misericordia, et Thomas teneat quietus.'

These questions are also answered by the twelve 'legales homines' of the neighbourhood.

The Assize was restricted, for none at first could be plaintiff who was not son, daughter, brother, sister, nephew or niece of the ancestor; some fifty years later supplementary actions on a 'Praecipe quod reddit' were given in regard to the seisin of a grandfather, great-grandfather, great-great-grandfather and a cousin (aiel, besaiel, tresail, and cosinage): the limit of time was the same as in *mort d'ancestor*⁴.

The second Assize was complementary of the first, but the two combined did not cover all cases of wrong to possession. The Assize of *Novel Disseisin* could only be brought when both disseisor and disseisee were alive. The heir of the disseisee could not be plaintiff, nor the heir of the disseisor the defendant. But if the disseisor be alive, the disseisee can successfully join him and any one who is in possession

¹ The word *ut* = quasi. Notice that the expression is not 'uide iure,' no question of 'ius' was left to the jury.

² i. e. within some time fixed by the ordinance.

³ i. e. the assize can be brought against any one holding the land.

⁴ P. and M., ii. 57.

through him. If the disseisor be dead, the disseisee must wait till the law invents the ‘writ of entry sur disseisin.’

The heir of the disseisee is also assisted. The disseisee himself was allowed four days after the disseisin to go north, south, east, and west, collect his friends, and forcibly repossess himself. If he died within that time, he died seised. His heir had a longer time for self-help, apparently a year. If the heir had himself taken seisin, he brought novel disseisin ; if he was ejected immediately after the death, he had his choice between the two assizes¹. As against any one in whose hands he found the land, the law finally gave him the ‘writ of entry sur disseisin,’ and the ‘writ of entry sur disseisin in the post’².

Thus the king had ordained, (i.) that none should be disseised of his free tenement ‘iniuste et sine iudicio,’ (ii.) that none should be disseised of his free tenement even by a judgement unless summoned by a royal writ, (iii.) that none should be forced to defend his seisin of a free tenement by battle. The claimant had to offer battle, the tenant might decline.

These Assizes were not the first in order of date. Two earlier ordinances touched the Church—the Assize of *Darrein Presentment* and the Assize *Utrum*. Their date of origin is obscure : they are both referred to in the *Constitutions of Clarendon* (1164), and there is evidence that something like the latter was known in the time of Stephen.

The first dealt with advowsons. The king says that he who presented last time shall present this time also, but without prejudice to any question of right. The neighbours are summoned to declare who presented last.

‘Quis advocatus tempore pacis presentavit ultimam personam quae mortua est ad ecclesiam de Westonam cuius

¹ Glanv. 13, 11. Bract. f. 273.

² Vide P. and M., ii. 52–65. In 1259 damages could be given in mort d’ancestor. Ibid. 59.

advocationem Rogerus de Suttona petit versus Thomam de Nortona.¹

The institution of this Assize had two edges, for the king claims as against the Church that such litigation is temporal, and as against his feudatories that it belongs to the king's court¹.

(4) The
Assize
Utrum.

The Assize *Utrum*² was employed in the following case. The Church claimed for her courts all litigation about land which had been given by way of alms to her, and the preliminary question naturally arose whether in any particular case, as a fact, the land in question was lay or not. The impartial country-side was then called upon to say 'Yes' or 'No' to that question.

These Assizes are commenced by the plaintiff getting the royal writ directing an inquiry and directing the impanelling of the twelve 'legales homines.'

Thus partly by the writ process and partly by employing the fiction of the king's peace in an action for trespass the royal courts obtained the control of ordinary litigation and have never since lost it.

By the Provisions of Westminster (1259) confirmed by the Statute of Marlborough (1267), no lord may compel his freeholder to swear against his will; the lord could not therefore impanel a jury of freeholders without their consent; the king both could and did. Moreover it is also provided that none but the king may hold a plea of false judgement, thus no appeal lies from lord to overlord, and the overlord's court became valueless³.

There are two more points to notice. The sheriff's jurisdiction was doomed also. The sheriffs were in some cases hereditary officials, and although a few of them were

¹ Cf. *Const. of Clar.*, cap. i.

² *Ibid.*, cap. ix.

³ 52 Hen. III, cc. 19, 23.

satisfactory,—some of them were justices of the king,—the system had not proved a success, and a crisis came when Henry II (in 1170) ordered the Inquest of sheriffs¹ and removed the majority of them from their offices, acting on the grave complaints which he heard on all sides of their misconduct and extortion, ‘pro eo quod male tractaverant homines regni sui².’ Magna Charta said that the sheriffs were not to hold pleas of the crown, and thus swept away the most important part of their criminal jurisdiction³, and in the reign of Edward I almost the last blow was given, for by a clause in the Statute of Gloucester, 1278, it is provided that no one is to have a writ of trespass in the king’s court unless he will affirm that the goods taken away were worth 40*s.* at the least. This was ingeniously construed to mean that no action for more than 40*s.* should be brought in a local court, or at any rate that the suitor must take out a royal writ to the sheriff without which the sheriff could not act. As the writ issued from the king’s court and had to be paid for, it was just as cheap to go straight to the king’s court and try the action there.

A cause was removable into the county court from the lord’s court, either for defect of right or with the lord’s consent by the sheriff’s precept called a ‘Tolt,’ ‘quia tollit et eximit causam e curia baronum.’

If the king’s court desired to call up a cause from the sheriff’s court, it did so by a writ of ‘Pone.’

‘Rex vicecomiti salutem. Pone coram me vel iustitiis

¹ Stubbs, *Sel. Ch.*, p. 147.

² Pl. Ang.-Nor., p. 216. See, however, that the chronicler says that the king replaced some of them, ‘atque ipsi postea multo crudeliores extiterunt quam antea fuerunt.’

³ This clause was held apparently to apply only to ‘hearing and determining,’ and not to the sheriff’s power to receive indictments in felonies and misdemeanours and arrest and imprison thereon. This was set at rest by 1 Edw. IV, c. 2, which gave this authority to justices of the peace only.

meis die etc. loquelam quae est in comitatu tuo inter
A et N, etc.' Glanv., lib. 6, cc. 6, 7.

Error. If after judgement in an inferior court it was sought to establish error, the record was ordered up to Westminster to be examined for errors on its face. If, however, this court had not the privilege of keeping a record—some county courts had and others had not (the itinerants are said not to have had it)—the judges were directed to make a record and bring it up.

Writ of 'recordari facias.' 'Praecipio tibi quod recordari facias in comitatu tuo loquelam, etc.' Glanv., lib. 8, cc. 6, 7.

CHAPTER IX

THE CIRCUIT SYSTEM AND THE CENTRAL COURT

It is proper now to see how the royal justice was brought close to the people. William I occasionally sent down somebody from his court to try an important case, and Rufus sent down into the west Bishop Walkelin and his chaplain Flambard and two others, to hold royal pleas in Devonshire, Cornwall, and Exeter¹. The 'Missi.'

The record says 'ad investiganda regalia placita,' but it is probable that the words 'regalia placita' do not mean 'pleas of the crown' in our sense, but royal business generally; at any rate the royal business of which we have a record was to hear a suit on behalf of the king for a certain manor which was held by the Abbot of Tavistock. Everything has a beginning, and the practice of sending judges into the country to do the royal business grew.

Henry I sent itinerants, for we have a record in the thirty-first year of his reign which exhibits a system of 'itinera' in full working order². Their commission was to clear the gaols, to hear pleas of the crown, and take pleas of realty up to a certain value. Henry seems to have been rather active in the administration of justice, for we find in the Anglo-Saxon Chronicles of 1124³ the following entry: 'In the

¹ *The King v. Abbot of Tavistock*, Pl. Ang.-Nor., p. 69.

² Stubbs, *Const. Hist.*, i. 391.

³ Stubbs, *Sel. Ch.*, p. 98.

same year, after St. Andrew's Mass, before Christmas, Ralph Bassett and the king's thegns held a "Gewitenemote" at Hundehoge in Leicestershire, and their hanged so many thieves as never was before, that was in that little while, altogether four and forty men, and six men were deprived of their eyes and emasculated'; and in the chronicle of 1135: 'The king died on the following day after St. Andrew's Mass Day in Normandy. Then there was tribulation soon in the land, for every man that could, forthwith robbed another. A good man he was, and there was great awe of him. No man durst misdo against another in his time. He made peace for man and beast. Whoso bare his burden of gold and silver, no man durst say to him aught but good.' But Henry did not try to lessen the importance of the county court. On the contrary, somewhere between 1108 and 1112, he issued an order to Bishop Sampson and the sheriff of Worcester, directing them and every one else to go to the county court and the hundred court as they had done in the time of King Edward¹.

Henry II
and the
circuit
system.

His cen-
tral court,

The reign of Henry II was of still greater moment to the history of English law. In 1176 Henry II made six circuits of three judges, and two years afterwards made an inquiry if the system had worked well, and found that it had given great dissatisfaction; so he recalled his eighteen judges, and took a very important step. He appointed five men, two clerics and three laymen, who were not to depart from the king's court, but were to hear all the complaints of the people. Questions that they cannot decide are to be reserved for the king and wise men, who always were the ultimate court of appeal, and are the earliest form of King and Council².

This court apparently sat term after term, usually at

¹ Stubbs, *Sel. Ch.*, p. 104.

² *Gesta Reg. H. II* (Rolls Series), i. 207-8.

Westminster, but sometimes at the Exchequer, and Glanvill was one of the judges. Next year he divided England into four parts and to each part sent 'viros sapientes ad faciendam iustitiam' ¹. The commissions of the former itinerants had been limited: cases of difficulty were to be reserved. If this was the rule now, it is curious that the judges of the northern circuit, six in number, seem to have been identical with the .. tribunal sitting in London ².

or 'the Bench.'

It is proper, however, to say that the precise relationship between these itinerant judges and those who were sitting in London is disputed. But it is certain that most judges who went journeying through the country are of less importance than the judges who stayed in London. The judges who stay in London are the justices who hold pleas before the king. We find in the second year of John that the Abbot of Leicester, being sued before the justices of the Bench, pleaded a charter of exemption from suit except before the king, and his chief justiciar. Held: the pleas before the justices of the Bench were before the king ³.

It did not follow that the justices who were sent out itinerant were lawyers in our sense of the term, for we read in Ralph de Diceto that Henry was making experiments: 'now he sends out abbots, now earls, now chaplains, now men of his household, now his most intimate companions, to hear and try cases'; and he ended by appointing, though apparently merely for a time, the Bishops of Worcester, Ely, and Norwich, as arch-justiciars ⁴ of the king.

Before the end of his reign there was a permanent central tribunal of sworn judges. It is *capitalis curia regis*: it must be distinguished from the Exchequer, for though it often

Distinct
between (a)
*capitalis
curia regis*,

¹ Hoveden, ii. 190 (Rolls Series).

² Ibid., p. 191.

³ Abbrev. Placit., 2 John, p. 32.

⁴ Rad. de Diceto, i. 434 (Rolls Series).

(b) Exchequer,
 (c) Great Council,
 (d) itinerants.

sat in the Exchequer, and many of its number were members of the Exchequer, it had a seal of its own; and it must be distinguished from the King's Council because difficult matters were reserved for the king and his wise men; and it held pleas 'before the king,' whether the king is in England or not. The itinerants went regularly: they probably sat under various commissions, and they could be summoned up before the central court to give an account of their doings, though frequently they had a member of the central court travelling with them. Glanvill, lib. 8, c. 5, distinguishes between 'capitalis curia regis' and the 'iusticiarii itinerantes,' although these latter form a 'curia regis coram iustitiariis itinerantibus'. Itinerants, says Bracton, are sometimes appointed 'ad omnia placita,' sometimes 'ad quaedam specialia.'

Henry's own share in the administration of justice was not trifling. When he was in England he frequently sat in court, and sometimes he went on eyre. There is an account of a suit at Clarendon between Abbot Walter and Gilbert of Balliol. The justiciar was there, but Henry intervened in the discussion, upholding the validity of the royal charters produced by the abbot, and swearing per oculos Dei that such charters cost him dear¹. Nevertheless judgement was given by the unanimous voice of the court, and not by the voice of the king. On another occasion², the charters being conflicting, Henry observed that they contradicted each other, and that he could make nothing of them, and flung out of court, saying that he must keep who can.

¹ *Select Pleas of the Crown* (Selden Soc.), Introd. pp. xi sqq.

² Pl. Ang.-Nor., p. 177.

³ *Archbishop of Canterbury v. Abbot of St. Edmund*, Pl. Ang.-Nor., p. 238.

“Nescio quid dicam: nisi ut chartae ad invicem pugnant.”

‘Rex vero iratus inde et indignans, surrexit et recedendo dixit,

“Qui potest capere, capiat,” et sic res cepit dilacionem, “et adhuc sub iudice lis est.”’

On another occasion the monks of St. Alban's declared that he showed a wisdom equal to that of Solomon when he declared that the unsealed land-books of the Anglo-Saxon kings were as good as sealed because they were confirmed by a sealed charter of Edward the Confessor.

In the reign of John we find that in Magna Charta there is a clause promising that two *justiciarii*, § 18, should be sent down to the Assizes four times a year, which indicates that the royal justice was becoming extremely popular. The point of the request, it is suggested, was that the itinerant justices were too often knights of the shire, and that the decision of a royal judge from the central court was preferred in matters of such importance.

Very early in John's reign we notice that the *capitalis curia regis* is showing, as the learned editor of the *Select Pleas* says, not a cleft, but a line of cleavage. A distinction is recognized between pleas held before the king himself, and pleas held before the justices of the Bench, who seem to have been sitting regularly at Westminster in the sixth, seventh, ninth, and tenth years of John. The king may have been away at times, but the courts do not coalesce when the king is back again at Westminster, nor is it certain that an action commenced in one division may not be adjourned into the other. Each is *curia capitalis*.

By the side of the journey of the itinerant justices we have an institution which must not be confused with it, that is, the general eyre, which went through the country irregularly, and in the time of Henry II went once in seven years. It took business of all sorts, not merely judicial; it is possibly correct to say that the least important part of its work was the hearing of pleas. It went through the country investigating the whole system of administration. Before the commissioners started on their journey they were given a set of

The
General
Eyre.

interrogatories, which are called the articles of the eyre—the ‘capitula itineris’—and answers to these interrogatories were required from a jury of the neighbourhood. They were commissioners of revenue, they were also criminal judges, and in those times matters of crime and matters of revenue were very much akin.

We have, thanks to Professor Maitland, the account of the eyre in the county of Gloucester, 1221, and we find in Bishop Stubbs’ *Select Charters* that the inquisition of 1194 included the extent of the king’s demesne lands, questions about murder, robberies, escheats, wardships, marriages, widows, Jews, churches, and other sources of royal revenue¹. In 1198 we have another list including questions as to vacant churches, usury, treasure trove, purprestures, fugitives, weights and measures, and customs. The jury of the hundred to whom these questions were put have time to make their answer, and when they have made up their minds they make their presentments, and these presentments make up the record, and the entries are ‘dicunt,’ ‘sciunt,’ ‘nesciunt,’ ‘mali-credunt.’ The answers were carefully compared with the rolls of the sheriffs and coroners. Any omission was a ground for amercement; false presentments, foolish presentments (‘stulta presentatio’) and honest mistakes all helped the Treasury.

It is said that these eyres were so grievous and oppressive to the people, that sometimes on the rumour of their coming the inhabitants fled from their homes. It is possible that the general eyres were a substitute for the great progresses which the King and his Court used to make through the land. In any case they must be distinguished from the purely judicial commissions, in that they were to a great extent concerned with the king’s revenue².

¹ Stubbs, *Sel. Ch.*, p. 258.

² For the difference between a general eyre and a judicial eyre, cf. Stubbs, *Sel. Ch.*, pp. 258 and 358.

The provision in Magna Charta that the Common Pleas are not to follow the king was aimed at a very real grievance. Whether the object was or was not to prevent the Exchequer holding these pleas, it is certain that if anybody desired to have the advantage of the royal justice he must lay his account for making wearisome journeys, and following the king in his progressions, which were extremely long, and which might even take him out of the country into France : he must go attended by his witnesses ready to prove his case, and wait till he could get a day for hearing.

The Common
Pleas
stay in
London.

Difficulties such as they made it impossible for any but the most leisured or the most wealthy to embark on a suit in the King's Court with any hope of a satisfactory result. The Common Pleas, therefore, were no longer to follow the king, but were to be held in 'a certain place,' and that certain place was Westminster, where the Court of Common Pleas sat from the time of Magna Charta down to the day when the new courts of justice were opened at Temple Bar.

When Henry III began to reign he was an infant, and could not hold pleas, and the 'Bench' sat regularly at Westminster for the dispatch of civil and criminal business. There was no royal progress for any pleas to follow¹. But when he came of age he made progressions with judges in attendance, and pleas were heard 'coram rege,' and then two sets of Plea Rolls definitely appear, the Coram Rege Rolls, and the De Banco Rolls.

So when Edward I came to the throne we have the Curia Regis, or the Court which holds pleas before the king, or the King's Bench as we should call it ; we have the Exchequer

Cleavage
in the
Curia
Regis.

¹ During Henry's minority, the Council had supervision and revision on error of inferior Courts (Dufus Hardy, *Description of Close Rolls*, pp. 101-2), and emerged from this reign well organized. But note that in the next reign Council is not distinguishable from Parliament (*inf.* p. 82).

which ought to be attending to the fiscal interests of the Crown, but which likes to finger other and more profitable business, and is forbidden to do so by Edward, and we have the Common Pleas, or as it is known at that time, the Common Bench.

CHAPTER X

THE ENGLISH JUSTINIAN

THE reign of Edward I was remarkable not only for its legislative activity, but for what is more important for our purpose, the changes in the administration of justice which appear for the first time, and which left our judicial institutions in the form in which, with very slight alteration, they remained to the year 1875. Of Edward I Blackstone says, ‘in his time the law did receive so sudden a perfection that Sir Matthew Hale does not scruple to affirm that more was done in the first thirteen years of his reign to settle and establish the distributive justice of the kingdom than in all the ages since that time put together’; and Sir James Mackintosh says that ‘from the reign of Edward I we possess the Year Books, notes of cases adjudged by the courts who exclusively had the power of authoritative interpretation.’

Edward I:
his settle-
ment.

In the next century elementary treatises, digests, and works on special topics appear, written by Littleton, Fortescue, and Brook. ‘So conspicuous a station at the head of our uninterrupted jurisprudence has procured him the name of the English Justinian.’ ‘Absurdly enough,’ says Lord Campbell, ‘as the Roman Emperor merely caused a compilation to be made of the existing laws, whereas the object now was to correct abuses, to supply defects, and to remodel the administration of justice.’

The Curia Regis now broke up definitely into three bodies.

It had been separated into distinct tribunals doing a distinct work for some little time. With the Exchequer attending to the revenue, and the Common Pleas or Common Bench sitting at Westminster, the process of disintegration had commenced. In Henry III's time a further step had been taken. The great line of Justiciars who presided over the kingdom in the king's absence came to an end, and Robert Bruce was appointed 'capitalis iusticiarius ad placita coram rege tenenda' on March 8, 1268. He does not appear to have acted in Edward I's reign, and in 1273-4 Ralph de Hengham was appointed Chief Justice of the King's Bench, Roger de Seaton Chief Justice of the Common Pleas, in succession to Gilbert de Preston, the king allowing them a salary of only sixty marks a year, but 'adding a small pittance to purchase robes, and stimulating their industry by fees on the causes they tried.'

The Exchequer, which from the beginning had been a financial department, became more exclusively so in Henry III's reign. The Chancellor and the Justiciar are there, but they gradually withdraw. A new official called 'the treasurer' is the head, and from the beginning of Henry III's reign men are appointed to the Exchequer under the title 'Barons of the Exchequer.'

The Court of the King's Bench travelled about the country, and the Chief Justice Hengham was stationed from time to time at Winchester, Gloucester, York, and other places. The king went abroad to Aquitaine, and stayed there over three years, and on returning in 1289 found that his new judges had been misconducting themselves. It was alleged that the Lord Chief Justice had not only taken bribes himself, but had connived at his brother judges doing the same. The king thereupon without inquiry threw them all into prison. The charges having been investigated by a commission appointed by the king, they were all, except two, found

guilty, dismissed, and heavily fined, and their successors were required to swear upon entering office ‘that they would take no bribe, nor money, nor gift of any kind from such persons as had suits depending before them,—except a breakfast¹, which they might accept provided there was no excess.

The business of the King’s Bench was to correct all crimes and misdemeanours that amount to a breach of the peace, the king being then plaintiff, for such are in derogation of the *iura regalia*; and to take cognizance of everything not parcelled out to the other courts. It also had superintendence of the other courts by way of appeal: thus ‘error’ lay from the Common Pleas to the King’s Bench. It followed the king, the style of the court was ‘coram ipso rege,’ and its records are called ‘coram rege rolls.’ The Chief Justice was assisted by three *puisne* judges, and they formed the staff of the King’s Bench.

The Court of Common Pleas decided all controversies between subject and subject. It sat at Westminster and its records were called the ‘de banco rolls.’

The Exchequer was a board of revenue which sat to hear and determine matters in which the king’s revenue was concerned, to adjust and recover his revenue, the king being plaintiff, as such matters touch his *iura fiscalia*. In later times the Court of Exchequer developed two sides, the common law side, which sat for the benefit of the king’s accountants, and where the proceedings on the writ of *Quominus* were heard, and the equity side, formed by the Lord Treasurer, the Chancellor of the Exchequer, the chief baron and three *puisnes*, which called the king’s debtors to account by a bill filed by the Attorney-General. The equitable jurisdiction was taken away in 1842, when two new Vice-Chancellors were appointed to do the work so

The
King’s
Bench.

The
Common
Pleas or
Common
Bench.

The Ex-
chequer.

¹ Rapin, iii. 245, and see a similar oath required from the judges, *Rot. Claus.*, 1 Edw. II, m. 19.

liberated. This did not, however, affect the jurisdiction of the Exchequer in revenue cases, where law and equity had always been concurrently administered¹.

The Great Council.

Council
and Par-
liament.

There is, meantime, an important development proceeding in the King's Council. The Council of wise men had, from the earliest Norman times, always been consulted by the king in cases of difficulty. So in the case of *Abbot Gausfrid v. Abbot of Marmoutier*, the defendant comes over to try to subject the Abbot of Battle to his jurisdiction, and tries to approach the king privately 'per internuntios sagaciter.' The king, though much inclined to help, thought that he had better say nothing finally, 'absque consilio.' Before the Council the abbot alleged a gift from King William. The Council requires to see the deed of gift. The abbot says that the king's word is good enough. 'No,' says the Council, 'in so great a matter we must have either a charter or witnesses *viva voce*'².

So also in the case of the widow and eldest son of Hugh Bigot in 1174. This was a claim to estates: both parties approach the king with money. The king, however, directs a hearing before the earls and barons³. So in the time of Henry II and Henry III any orders or writs which are without precedent are made 'de consilio curiae.'

The Par-
liament
of 1305.

But in the reign of Edward I, a new body makes its appearance under the name of the Parliament, and we have the record of the Parliament of 1305 published in the Rolls Series with an introduction by Professor Maitland⁴. This was in the thirty-third year of Edward I in the month of February. It was a full Parliament: the three estates of

¹ *A.-G. v. Halling*, 15 M. & W. 687.

² Pl. Ang.-Nor., p. 122.

³ *Ibid.*, p. 230.

⁴ *Memoranda de Parlamento*, 1305.

the realm met, the King and his Council, in all about six hundred men. Besides, there were thirty-three members of the King's Council to whom, though not prelates or barons, writs were sent, and others were summoned to advise the king from their special acquaintance with Scotch and Gascon affairs.

This assembly kept together for three weeks, and on the 21st of March proclamation was made that the archbishops, bishops, and other prelates, earls, barons, knights, citizens, and burgesses might go home, but they must be ready to come again, when wanted, ‘sauve les Evesques Contes et barones justices et autres qui sount du conseil nostre seigneur le roy’; which we may suppose, as Mr. Maitland says, must have been an intelligible order to those to whom it was addressed. Those persons still remained who had business to transact, and Parliament remained in session till the 6th of April, on which day the ‘dominus Rex’ is still ‘in pleno Parlamento¹.

It is very uncertain what the composition of the King's Council was, but there were thirty-three men who were not barons or earls, summoned by name. They included the Chancellor of the Exchequer, the Justices of the two Benches, the Barons of the Exchequer, several ‘itinerants,’ and thirteen clerks of the Chancery. The Chancery is the great secretarial department, and does the king's writing, foreign and domestic.

The other great administrative department is the Exchequer, over which the Chancery had a control, the extent of which we do not know. These thirty-three men represent the legal, official, and administrative talent of the country. If we knew the names of the other councillors who attended on being summoned as prelate or baron, such as the Chancellor, who comes as Dean of York, we should have

The composition
of the
Council.

¹ *Mem. de Parlamento*, p. 293 (Rolls Series).

a nearly complete list of the Council, but even then the names of some nobles who were out of favour would be absent. Professor Maitland has compiled a list of names from a comparison of the signatures of those who, before and after the dismissal of the estates, witnessed the king's charters. The names occur of Walter Langton Bishop of Lichfield and Treasurer, Antony Beck the great fighting Bishop of Durham, John Halton Bishop of Carlisle, and the Bishop of Salisbury, the Earls of Lincoln, Gloucester, Hereford, Warwick, and Carrick, Henry Percy, Hugh Despenser, and Robert Clifford, both justices of the forest, John of Brittany, and Aymer de Valence, the king's best generals. These men were all of them important officials¹.

This meeting of the Council is, at the least, a full meeting of the King's Bench, the Common Bench, the Exchequer, the Chancery, the War Office, and the Wardens of the Marches.

Work
done by
the Par-
liament.

The business which was done in this Parliament was (1) the discussion of foreign affairs, Scotch and Gascon ; (2) legislation ; (3) taxation ; (4) audience of petitions ; (5) judicial business, criminal and civil.

With the first three topics we are not much concerned, nor is there much to note. With regard to legislation no statute appears at once on the statute roll, but there are a few acts of a legislative character. There is an *Ordinatio Forestae*, merely a royal answer to a petition : there is an ordinance of inquests 'ordained by the king and his whole council.' There

¹ Doubtless the king was entitled to call on any of his lieges to give him faithful counsel, a duty, when travelling was difficult, both onerous and inconvenient. As late as 16 Edw. II, Henry de Beaumont, a baron, being summoned to a council and asked his advice respectfully declined to give it. The king angrily ordered him to leave the council. He did so, remarking that he would sooner be out than in. For this refusal and contumely he was committed to prison (*Rot. Lit. Claus.*, 16 Edw. II, m. 5 d. *Plac. Abb.*, p. 342).

is a curious entry ‘de asportis religiosorum.’ ‘The king in full parliament with full consent of the barons, &c., and others of the realm has ordained as follows’—and then comes a blank. The explanation given of this is that the papacy at that time was vacant, and it may have been desirable to keep the question dealt with in abeyance. In any case the ordinance was formally re-enacted two years later at Carlisle, and appears on the statute book.

The ordinance of Trailbastons, i. e. clubmen, was also passed whereby the king appointed justices to inquire and hear and determine divers felonies and trespasses, and the commissions then issue¹. But this is not legislation properly so called, for the king always had large powers of issuing commissions. It was rather a great measure of police, for the purpose of dealing with vagabondage². Of taxation

Trail-
bastons.

¹ See Palgrave, *Parl. Writs*, i. 408.

² It appears from the commissions issued that many malefactors perpetrating homicides, depredations, fires, and other wrongs, wandered about and were harboured, and that the king appointed certain persons his justices to inquire who are these malefactors and their confederates, and who for gifts make a compact with malefactors and disturbers of the peace, and lure them to beat, wound, and ill-treat many in fairs, markets, and other places, from enmity also because they spoke the truth on assizes and inquisitions of felony. Persons charged with the above transgressions shall be proceeded against, though no one prosecutes, and if convicted be sent to gaol.

These ruffians were called Trailbastons. So Peter Langtoft's *Chronicle* says :

Traylhastons sunt nomez de cel retenaunce
 En fayres et marchez se proferent fere covenaunce
 Pur tres sous ou iiiii, ou pur la valiaunce
 Batre un prodhommke ke unk fist nosaunce
 A cors cristiene,
 Si homme countredye a nul de laliaunce

 Batut sera heen.

‘This company are called Trailbastons, they offer to make conventions at fairs and markets for three or four shillings, or merely to show their courage to beat a good man, who never did hurt to any

there was apparently none, although the king was very poor. A petition from the justices of both benches and the barons of the Exchequer and the clerks asking for their salaries was met by the answer ‘Quod Thesaurarius et Barones solvant quando poterint.’

The Petitions. The Audience of Petitions touches us more nearly. The greater part of the roll is taken up with entries on this subject. The petition, which is addressed to ‘our lord the king,’ or to ‘our lord the king and his council,’ not, it will

Christian body. . . . If a man contradict any one of the alliance . . . he shall be well beaten.’

These associations bear a likeness to the so-called ‘Hooligans’ of to-day, whose attentive co-operation in matters of personal enmity can, I am informed, be secured for a not unreasonable fee.

The commissioners had large powers, and incurred considerable unpopularity. The commission of 1305 for the west and south-west of England was addressed to Martyn, Spigurnell, de Knovill, de Bellafago, and de la Hyde. A contemporary ballad thus speak of the four :

‘Ly Martyn et ly Knoville sunt gent de pietè
E prient pur les povres, qu'il eyent sauveté.
Spigurnel e Belflour sunt gent de cruelté
Si il fuisen en ma baylie ne serreynt retornée.’

The ballad as translated by Lockhart proceeds through twenty-four stanzas of complaint :

‘Sir if my boy offend me now, and I my hand but lift
To teach him by a cuff or two what's governaunce and thrift
This rascal vile, his bill doth file, attaches me of wrong
Forsooth find bail or lie in gaol, and rot the rogues among.’

Of the two cruel justices it says :

‘I'd teach them well this noble game of trailbaston to know,
On every chine I'd stamp the same, and every nape also ;
On every inch in all their frame, I'd make my cudgel go,
To lop their tongues I'd think no shame, nor yet their lips
to sew.’

If these were the methods of the Trailbastons, some inhibitory process seems to have been desirable. These commissions issued at intervals till the middle of the reign of Richard II, when they ceased. The above extracts are from Wright's *Political Songs*. Mr. Lockhart's translation was published in 1828, in *The Bijou*. See also Foss., iii. 30 sq.

be observed, to ‘parliament,’ is on a small slip of parchment, with the answer endorsed on the back.

The method of dealing with these petitions was as follows. In the eighth year of Edward I the multitude of petitions was a great hindrance to business. They are, therefore, to be sorted and only those of great importance are to come before the king. In the twenty-first year of Edward I, 1293, these petitions were sent to Receivers, who were to examine and put them into five bundles ; (1) for the Chancery, (2) for the Exchequer, (3) for the Estates, (4) for the King and Council, (5) those which have been already answered¹. In 1305 the record shows that the king appointed three committees to deal with Gascon, Scotch, and Irish petitions, but there is no trace of any committee for England. In 1315 three committees are in existence, one for England, one for Gascony, and the Isles, a third for Ireland and Scotland. The English committee was composed of three bishops, two barons, a justice, a baron of the Exchequer, and a clerk of the Chancery. Some petitions from their importance are reserved for the king or the whole council. This is indicated by the words ‘coram rege’ or ‘coram consilio,’ preceding the answer and in a different handwriting. A clerk, having enrolled the petition in the Parliament Roll, sends the original off to Chancery. There the chancellor seals a writ or a charter, finding his authority in the endorsement on the petition. The endorsement is the order.

These petitions are not presented *to* Parliament but *at* a Parliament. A Parliament, says Professor Maitland, is rather an act than a body of persons at this time, and is, as yet, any meeting of the council that has been summoned for general purposes ; the term is not yet appropriated to colloquies of

What is
a Parlia-
ment?

¹ So in the Rolls of Parliament we find endorsements such as,

‘ Eat coram Iustic’ de Banco.’

‘ Veniat Cancellariam ut fiat ei quod gracie fieri potuit.’

the king with the estates of the realm, much less to the assembly of the estates. The petitions are not for anything like legislation, but for things which the king can legally grant either for justice or for grace. The answers are mainly remissions of the questions to those persons or courts which have proper cognizance of such things.

Procedure on Petitions. This is not mere waste of time. If *A* desires to bring an action against his neighbour, he must go to the clerks in Chancery, and if it is an ordinary case, a writ *de cursu*—‘of course’—will be issued, presumably on payment of a fee. Should the matter be unusual, the Chancellor will do nothing without a warrant from the King or Council, and the warrant is noted at the foot of the writ¹. So if *A* wants relief from the Exchequer he goes to the Council for an endorsement on his petition. He takes that to the Chancery, and gets a writ there; that goes to the Exchequer, where after it has been enrolled in each office, the treasurer and barons will begin to consider whether relief is proper or not.

Apparently sometimes the petitioner was required to appear and support his petition, and failing that it might be dismissed. Sometimes a knight of the shire presents the petition of his constituency and supports it, for such petitions come from the shires, and also from religious houses, universities and boroughs. So too the assembled ‘good men’ petition the king. All these petitions are jumbled up together, for between a petition of Roland of Oakstead and the citizens of Lincoln we find the ‘poor men of England’ complaining that juries are corrupted by the rich, and that ecclesiastical judges meddle with temporal suits. To this the king answers that the ordinary process is sufficient, the corrupt jury may be attainted, the ecclesiastical judges may be prohibited².

¹ *Mem. de Parl.*, No. 251, p. 158.

² *Ibid.*, No. 472, p. 305.

Later we perceive a difference. Petitions by 'the community of the land' will be inrolled with the royal answer, petitions to either House will also be inrolled, if the assent of the King and both Houses has been given. Ordinary petitions to the King and the Council will not be inrolled, i. e. petitions of those who have grievances. The business which we find the Commons doing is dealing with two petitions, which were refused, and joining in the statute *de asportis religiosorum*, which was temporarily hung up. This is not important activity, but no doubt they were useful as checking the official reports of what was going on throughout the country, and indeed the writ of summons calls them 'in order that they may do what shall be ordained.'

The judicial business of the session was scanty. Nicholas Segrave was tried for treason. He confessed. Edward asks the Council what punishment should be awarded, and the answer is 'Death'; but the king is content if he finds seven manucaptors to undertake that he should come up when called on. It is said that the Council discussed this matter for three days. The citizens of Salisbury resist a tallage imposed by a bishop under a charter of Henry III. They are summoned. They send four representatives: among them their two members. They plead. There is a discussion before the King and the Council. Judgement goes against them. In St. Amand's case certain great people undertake before the Council to produce the defendant before the king, when called on. Then there are proceedings in the King's Bench, from which we infer that there was a close connexion at that period between the Council and the King's Bench.

The real point of interest and difficulty is, as Professor Maitland says, the question as to what the jurisdictional competence of the Council was at the time, and the relation in matters of Judicature between Council and the nascent

Differentiation in Petitions.

The Commons as yet not important.

Judicial business before the King in Council in Parliament.

The rise of the High Court of Parliament.

House of Lords. Every High Court must have a separate set of Rolls. Leaving out of sight the Chancery, the Exchequer, and the Itinerants, we may say that Henry III had two courts, the Bench with the 'de banco rolls,' the King's Court with the 'coram rege rolls.' This last follows the king about, and for ordinary purposes consists of professional justices, while later the chief justice is definitely appointed to hold pleas before the king, but on occasion it could be reinforced by the king's councillors, barons, and earls. This body is superior to 'the Bench,' for 'error' lay to it from 'the Bench.' But a new set of plea Rolls begins to appear, not purely for pleas, for we find that petitions and other things are on it. The court which is to be above the King's Bench is being evolved, and its Rolls are the Parliament Rolls. For a time it is hardly distinguishable from the King's Bench. It is really an afforeed form of the King's Bench, and this is made certain by our finding that a plea may be adjourned from a Parliament to the King's Bench or vice versa without breach of continuity.

Thus two tribunals become three: Bracton knows two¹. Fleta knows three²: 'justices resident at the bench,' 'justices who fill the king's own place,' and another, 'habet enim rex curiam suam in consilio suo in parliamentis suis, praesentibus praelatis, comitibus, baronibus, proceribus, et aliis viris peritis ubi terminatae sunt dubitationes iudiciorum et novis iniuriis emersis nova constituuntur remedia, et unicuique iustitia, prout meruit, retribuetur ibidem.'

It is useless to ask if this is Council or House of Lords. It is the King in Council; it is the King in Parliament, for its sessions are parliaments.

The King in Parliament and The future settled that the highest court of ordinary jurisdiction should be the King in Parliament, and this

¹ f. 108.

² p. 66.

should mean the House of Lords, and should be mainly a court of error, and that the King in Council should dispense extraordinary justice, both civil and criminal, on a large scale. Whether the elastic and extraordinary nature of the Council jurisdiction was cause or effect, it is noticeable that the Parliament keeps a proper Latin plea roll and the Council keeps none, and this was alleged as a ground of complaint against the Star Chamber by the Act which abolished it¹.

Long ago the Parliament Roll left the custody of the Council to become the record of the estates of the realm, and those who used to be official members of the Council, such as the judges, and who are still summoned to Parliament without being peers of the realm, attend as 'mere assistants' without a vote, and they must not speak unless asked.

But at this moment this third great court partakes of the nature of House of Lords, Council, and King's Bench. It is an afforementioned form of the King's Bench, yet superior to it; it is sometimes a court of first instance, though why is a matter of speculation in each particular case. It is consulted when new remedies are required by the Chancellor, and, if the passage in Fleta means anything, its jurisdiction was what we should call equitable, foreshadowing the jurisdiction of the Council's important legal official, the Chancellor.

The period is important and interesting, for the moment when petitions divide into those which are entered on the Parliament Roll, and those which are not, is the moment when the functions of Parliament and Council begin to differentiate themselves; the King in Parliament is the Legislature, the King in Council is the Executive, and the depositary of extraordinary royal justice.

Parliament and Council begin to separate.

¹ 16 Car. I, c. 10.

CHAPTER XI

THE COURTS OF COMMON LAW

As in the reign of Edward I the administration of the common law took the shape which it kept till the Judicature Act of 1873, it will be convenient briefly to sketch the functions and fortunes of the superior courts. Though the establishment of the Common Pleas at Westminster relieved parties from the expense of travelling about after the King's Court, yet they had to come up to Westminster: so by the Statute of Westminster II litigants were permitted to prosecute and defend their suits by an attorney, or as we should say nowadays by a solicitor¹. The King's Bench could always be directed to accompany the king, and thus we find that while writs in the Common Pleas were made returnable at Westminster, those in the King's Bench were returnable 'before the king himself wherever he should then be in England.' Once the court followed Edward to Scotland and sat at Roxburgh. The Exchequer, for obvious reasons of convenience, very soon sat only at Westminster, and the King's Bench shortly followed the example.

These two courts having become stationary, but having no jurisdiction over purely civil cases, which were the province of the Common Pleas, commenced to poach on this well-stocked preserve,—'boni iudicis est ampliare iurisdictionem,' and virtue was suitably rewarded by court fees.

¹ 13 Edw. I, c. 10.

The Exchequer employed the writ of *Quominus*, in which the plaintiff, who desired his case tried in the Exchequer, suggested that he was the king's debtor, and that the defendant had done him an injury, 'quominus sufficiens existit' to pay the king his debt. The allegation of a king's debt was a mere fiction, but it was not allowed to be contradicted, and it was held that this circumstance made the action a revenue matter, properly cognizable in the Exchequer. This writ was a *capias*, and on it the defendant could be arrested and brought into the Exchequer. The writ was as follows:—

The Writ
of Quo-
minus.

'George II, by the grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith and so forth, to the Sheriff of Berkshire greeting. We command you that you omit not by reason of any liberty of your county, but that you enter the same, and take Charles Long, late of Burford of the county of Oxford, gentleman, wheresoever he shall be found in your bailiwick, and him safely keep so that you may have his body before the barons of our Exchequer at Westminster on the morrow as hereby directed to answer William Burton our debtor of a plea that he render to him £200 which he owes him and unjustly detains, whereby he is the less able to satisfy us the debts which he owes us at our said Exchequer, as he saith he can reasonably show that the same he ought to render: and have you there this writ. Witness, Sir Thomas Parker, Knight, at Westminster, the sixth day of May in the twenty-eighth year of our reign.'

To which the sheriff makes a return: 'By virtue of this writ to me directed I have taken the body of the within named Charles Long, which I have ready before the barons within written, according as within it is commanded me.'

The King's Bench employed the writ of *Latitat*. The Court of King's Bench had an original jurisdiction in tres-

passes 'vi et armis,' committed in Middlesex or in whatever county the court happened to sit, such trespasses being considered to be of a criminal nature and to demand a speedy remedy. The plaintiff therefore, who desired to bring a civil action, say for debt, in the King's Bench, took out what was called a bill of Middlesex, alleging in it trespass 'vi et armis.' In it, the sheriff was directed to take the defendant and to have him before our lord the king at Westminster to answer. Once the defendant was in the custody of the marshal of the King's Bench he was considered to be before the court for all purposes and could be proceeded against by bill for debt which made it unnecessary to take out an original writ as was the proper course on such a cause of action.

In time it was considered enough that the defendant should appear or give bail, and actual custody was not required. If the sheriff of Middlesex could find the defendant, well and good, he produced him in court: should the defendant be living in Berkshire, that made no difference, the sheriff made the return 'Non est inventus,' and then came the writ of *Latitat* addressed to the sheriff of Berkshire where the defendant lived, reciting the bill of Middlesex and the proceedings thereon, and that it is testified that the defendant 'latitat et discurrit' in Berkshire, and commanding the sheriff to have his body in court on the day of the return.

Many complaints arose that persons were arrested on these Bills and Latitats which did not express any particular cause of action, and were kept long in prison for want of bail, bonds with sureties having been demanded in such great sums that few dared to be security to such an amount, although there were little or no cause of action. Accordingly the Statute 13 Car. II, st. 2, c. 2, provided that the true cause of action should be expressed in the writ, else the person arrested should be bailed and no security for appear-

ance should be taken in a greater sum than £40. To meet this difficulty the King's Bench added an '*ac etiam*' clause to the usual complaint, thus if the plaintiff wished to sue the defendant for debt he alleged first of all the trespass 'vi et armis,' and then added the '*ac etiam*' clause in which the debt was mentioned, as though it was subsidiary to the fictitious claim.

'Middlesex to wit:—The sheriff is commanded that he take Charles Long, late of Burford in the county of Oxford, if he may be found in his bailiwick, and him safely keep so that he may have his body before the lord the king at Westminster on Wednesday next after fifteen days of Easter to answer William Burton, gentleman, of a plea of trespass (*and also* to a bill of the said William against the aforesaid Charles for £200 of debt according to the justice of the said court of the said lord the king before the king himself to be exhibited) and that he have there then this precept.'

The sheriff's return: 'The within named Charles Long is not found within my bailiwick.'

'George II, by the grace of God the Lord of Britain, France, and Ireland, the King, Defender of the Faith and so forth, to the Sheriff of Berkshire greeting. Whereas we lately commanded our sheriff of Middlesex that he should take Charles Long, late of Burford in the county of Oxfordshire, if he might be found in his bailiwick, and him safely keep so that he might be before us at Westminster, at a certain day now passed, to answer unto William Burton, gentleman, of a plea of trespass (*and also* to a bill of the said William against the aforesaid Charles for £200 of debt according to the custom of our court before us to be exhibited) and our said sheriff of Middlesex at that day returned to us that the aforesaid Charles was not found in his bailiwick, whereupon on behalf of the aforesaid William in our court before us, it is sufficiently attested that the afore-

The
Bill of
Middle-
sex.

The writ
of Latitat.

said Charles lurks and runs about in your county, therefore we command you that you take him, if he may be found in your bailiwick, and him safely keep so that you may have his body before us at Westminster on Tuesday next after five weeks of Easter, to answer to the aforesaid William of the plea (and bill) aforesaid, and have you there then this writ. Witness,' &c.

On which there comes the sheriff's return : 'By virtue of this writ to me directed I have taken the body of the within named Charles Long which I have ready at the day and place within contained according as by this writ it is commanded me.'

Thus, these two courts obtained a jurisdiction coextensive with that of the Common Pleas in personal actions.

Uniformity of Process Act.

This state of things lasted till 1832, when the Uniformity of Process Act, 2 Will. IV, c. 39, abolished this variety and multiplicity of process, but recognized and confirmed the co-ordinate jurisdiction.

The King's Bench : its supervisory powers, and methods.

The King's Bench presided over the administration of the criminal law. There was and is no offence not triable there. It superintended the other tribunals, employing the writs of *mandamus*, *prohibition*, *certiorari*, and *error*.

The writs of Mandamus and Prohibition issued, and issue still, when either justice is delayed by an inferior court that has proper cognizance, or such inferior court takes upon itself to examine a cause and decide the merits without legal authority. In the first case a writ of Mandamus is issued. 'This is a prerogative writ flowing from the king himself sitting in the Court of the King's Bench, superintending the police, and preserving the peace of the country¹.' It issued from the King's Bench, and was a command directing any person, corporation, or inferior court of judicature in the king's dominions to do *some particular thing* therein specified

¹ Per Lord Mansfield, *R. v. Barker*, 1 W. Bl., 352.

appertaining to its office or duty, which the Court of King's Bench supposes to be consonant to right and justice, where the performance of the duty sought to be enforced could not be compelled by action. An order *nisi* issues in order to give the other side an opportunity of showing cause why a mandamus should not issue. There was a similar writ 'procedendo ad iudicium' which issued from Chancery for delay in giving judgement returnable in the King's Bench or the Common Pleas. It did not direct any particular judgement to be given, for an erroneous judgement may be set aside on appeal, but *some* judgement must be given without further hesitation. Disobedience is punished by attachment, and committal for contempt.

Edward by the grace of God, &c. to . . of . . greeting.
Whereas by . . (recite act of Parliament, &c.) and
whereas we have been given to understand, and are
informed in the King's Bench Division of the High
Court of Justice before us that . . (insert averments)
and you the said . . were then and there required by . .
(insert demands), but that you the said . . well knowing
the premises, but not regarding your duty in that behalf,
neglected and refused to . . &c., we . . do command you
. . firmly enjoining you that you, &c.

The writ
of Man-
damus.

A 'prerogative' writ is one which does not issue like others of strict right, but at the discretion of the sovereign acting through that court in which he is supposed to be present, and only issues from the King's Bench Division¹.

In the second case the writ of Prohibition is employed. This is a prerogative writ which issued properly out of the King's Bench, but for the furtherance of justice in some cases out of Chancery, Common Pleas or Exchequer, but returnable only in the King's Bench or Common Pleas, now the King's Bench Division, directed to the judge and parties of a suit in any inferior Court, commanding them to cease

The writ
of Pro-
hibition.

¹ Per Manisty J., *R. v. Lambourne, &c. Ry. Co.*, 22 Q. B. D. 469.

from the prosecution thereof, on the suggestion that either the cause originally or some collateral matter arising therein does not belong to that jurisdiction, but to the cognizance of some other court.

Since the Judicature Acts an appeal lies from every order of the High Court of Justice to the Court of Appeal, and thence to the House of Lords, but till then the only method of questioning the propriety of a prohibition was by the issue of a writ of Consultation under the Statutum de Consultatione 24 Ed. I, for it was held that in such a case a writ of error did not lie either to the Exchequer Chamber¹ or to the House of Lords².

If the judge to whom the prohibition went thought it ill founded, he consulted with the king's justices, and if it appeared to the court that it ought not to have issued, a 'consultation' was awarded, signifying to the inferior court that it might lawfully proceed.

The writ
of Pro-
hibition
to an ec-
clesiasti-
cal court.

'Rex, &c. iudicibus ecclesiasticis salutem. Prohibeo vobis ne teneatis placitum in curia christianitatis quod est inter M. et R. de laico feodo predicti R. unde ipse queritur quod M. eum trahit in placitum in curia christianitatis coram vobis, quia placitum illud spectat ad coronam et dignitatem meam.'

The writ
of consul-
tation.

'Dilecto in Christo tali. Inspectis litteris vestris, quas nobis transmisistis et plenius intellectis (sine praeiudicio melioris sententiae) consultationi vestrae duximus respondendum, quod si res ita se habet sicut in consultatione vestra exposuistis videtur nobis quod in causa ista bene potestis procedere non obstante regia prohibitione.'

If the judges did not obey they were summoned to the King's Court to answer.

¹ *Free v. Burgoyne*, 5 B. & C. 765.

² *Bishop of St. David v. Lucy*, 1 Lord Raym. 539.

‘Rex vicecomiti salutem. Prohibe iudicibus—ne te-neant placitum . . . Et summone per bonos summoni-tores ipsos iudices quod sint coram me vel iustitiis meis ostensuri quare placitum illud tenuerunt,’ &c. Glan., Lib. 4, cc. 13–14.

The modern form is as follows :—

‘Edward, by the grace of God, &c. to [the keepers of Our peace and Our justices assigned to hear and determine divers crimes, trespasses, and other offences committed within Our County of . . .] greeting.

Whereas We have been given to understand that you the said [justices have entered an appeal by A. B. against etc.]. And that the said . . has no jurisdiction to hear and determine the said . . by reason that [here state facts showing want of jurisdiction].

We therefore hereby prohibit you from further proceeding in the said . .’

Witness, &c.

‘Thus careful has the law been in compelling the inferior courts to do ample and speedy justice: in preventing them from transgressing their due bounds, and in allowing them the undisturbed cognizance of such causes as by right founded on the usage of the Kingdom or an Act of Parliament do properly belong to their jurisdiction¹.’

The writ of Certiorari issues to judges or officers of inferior jurisdictions from the King’s Bench, now² the King’s Bench Division of the High Court, to certify or send proceedings before them into the King’s Bench Division, whether for the purpose of examining into the legality of such proceedings, or for giving fuller or more satisfactory effect to them than

Writ of
Certio-
rari.

¹ Bl., *Comm.*, iii. 114.

² Judicature Act, 1873, § 34.

could be done by the court below. It also issues from the House of Lords, on motion there, for removing thither an indictment for felony found by a grand jury against a Peer¹. It can also be used for removing indictments found at Quarter Sessions in London, Westminster, Southwark, Middlesex, Essex, Kent, and Surrey, into the Central Criminal Court, and for removing indictments from any Court of Session Assize (including the Central Criminal Court), Oyer and Terminer, a gaol delivery or any other court into the King's Bench Division on the Crown side. The Crown can demand this writ of absolute right, the subject obtains it at the discretion of the court. The grounds on which it is granted are that a fair and impartial trial cannot be had in the court below, that questions of law of unusual difficulty may arise, or that a special jury may be required for a satisfactory trial.

Writ of
Certiorari to
remove
Indictment into
King's
Bench
Division
from
Assizes.

'Edward by the grace of God &c. to Our justices of Oyer and Terminer, in and for Our County of Oxford, and to every of them greeting: We being willing for certain reasons that all and singular indictments of whatsoever felonies [or misdemeanours] whereof *A. B.* is or may be before you indicted (as is said) be determined before us in the King's Bench Division of our High Court of Justice, and not elsewhere, do command you, and every of you, that you or any of you do forthwith send under your seals, or the seal of one of you, before us in Our said Court at the Royal Courts of Justice, London, all and singular the said indictments, with all things touching the same by whatsoever name the said *A. B.* may be called therein, together with this Our Writ, that We may cause further to be done thereon what of right and according to the law and custom of England We shall see fit to be done.'

Witness, &c.

¹ Trial of Earl Russell. Before the King in Parliament, 1901, A. C. 446.

The ‘writ of error’ issued either on the suggestion of some fact which affects the validity of the action, as for instance, that the unsuccessful party was an infant and appeared by attorney, or on some error in point of law, apparent on the face of the proceedings; or in other words, error on the record. Errors in law from the Common Pleas were taken to the King’s Bench till 1830.

The Exchequer declined in 11 Ed. III to send their record to the King’s Bench on the ground that the Exchequer had always amended its own error with some outside assistance. This position they maintained, but they failed to prove their independence of the Curia Regis. By the 31 Ed. III, st. 1, c. 12, the Lord Chancellor and the Lord Treasurer, associating with themselves Judges and other learned persons, were directed, on complaint of error in the Exchequer, to call before them the Barons of the Exchequer with the record, and amend the error, if any. This was the first court of Exchequer Chamber. By the 27 Eliz. c. 8, a second court of judges of the Common Pleas and of the Exchequer was formed to review certain judgements in the King’s Bench, other judgements going direct to the House of Lords; and by the 11 Geo. IV, 1 Will. IV, c. 70, writs of error upon any judgement given by the King’s Bench, the Common Pleas, or the Exchequer shall be only returnable in the Court of Exchequer Chamber, before the judges of the other two courts. From that court appeal lay to the House of Lords, which represents the old Curia Regis.

The Common Law Procedure Act, 1852, abolished the writ of error in actions in the Superior Courts and a memorandum in error was substituted; that again was abolished by the rules under the Judicature Acts¹, and an appeal in the full sense provided instead.

¹ O. 58.

Writ of
error in
criminal
cases.

The writ still exists as part of the Criminal Law¹, but only where some irregularity apparent upon the record of the proceedings takes place in the procedure. It issues from the Crown Office² on the fiat of the Attorney-General, and is directed to the judge of the inferior court, requiring him to send the record and proceedings of the indictment, inquisition, or information, on which judgement has been pronounced, and in which error is alleged, to be ‘inspected, viewed, and examined,’ to the court authorized to review the same. That court may examine the record, and affirm or reverse the judgement according to law. The judgement must be on an indictment and given in a Court of Record.

By this means, a criminal appeal of this limited kind can be taken to the Court of Appeal and thence to the House of Lords, as in the case of *Castro v. The Queen*³.

The
Courts of
Assize and
Nisi Prius.

At the present day the judge who goes on circuit sits under three commissions: (1) the commission of General Gaol Delivery, in virtue of which he clears the gaol of all persons awaiting trial; (2) of Oyer and Terminer, in virtue of which he tries those criminal cases in which the grand jury have found a true bill; (3) the commission of Assize, which is a survival of the old commission empowering the judge to take the verdict of that special sort of jury called an Assize, summoned for the trial of certain issues (*vide supra*), to which, by Stat. West. II. c. 30, is annexed the commission of *Nisi Prius*. Before the *Nisi Prius* writ was invented, if the plaintiff had an action in Oxfordshire, he had to come up to London to try it, and bring his witnesses, the sheriff of the county being directed by a writ of *venire facias* to bring up an Oxfordshire jury; when the Statute empowered the judges

¹ For the history of the writ of error in criminal cases, see Lord Mansfield's judgement in *Wilkes' case* (4 Burr. 2550).

² R. S. C. 31 Jan. 1889.

³ 6 Ap. Cas. 229.

of Assize to try other issues in the counties, the writ was altered, and the sheriff was directed to bring up the twelve lawful men from Oxford to try the Oxfordshire case in London, unless before the date specified, the justices of the king had come into that county, ‘nisi prius ad partes illas venerint,’ in which case the justices tried the cause in Oxford, and spared everybody the trouble of coming to London. The amended form of the writ was: ‘Praecipimus tibi quod venire facias coram iusticiariis nostris apud Westmonasteriam in Octabis Sancti Michaelis, nisi talis et talis tali die et loco ad partes illas venerint, duodecim legales homines, &c.¹,’ in which case it was his duty to return the jury, before the judge of Assize. By the 27 Ed. I, c. 3, the justices of Assize were made commissioners of gaol delivery. By the 2 Ed. III, c. 2, they were made commissioners of oyer and terminer. Since the Judicature Act of 1873 the judge acting under these commissions is ‘a court of the High Court of Justice²,’ which means that he is not limited by the terms of his commissions, but that he can do anything that a judge sitting in the Royal Courts of Justice can do. Before the Act a mandamus could issue to him if he refused to perform an obligatory duty³.

¹ 13 Edw. I, c. 30, § 1.

² 36 & 37 Vict. c. 66, § 29.

³ *R. v. Harland*, 8 A. & E. 826. See, however, the judgement of Willes J. in *Ex parte Fernandez*, 10 C. B. N. S. at p. 49.

The High
Court of
Parlia-
ment.

CHAPTER XII

THE HIGH COURT OF PARLIAMENT, THE HOUSE OF LORDS, AND THE COURT OF THE LORD HIGH STEWARD.

WE have already seen that in the reign of Edward I a court is being evolved which may be considered as higher than the King's Bench or as an 'afforced' form of the King's Bench. But it is presently recognized as distinct, 'habet Rex curiam suam in consilio suo in parliamentis suis . . . ubi terminatae sunt dubitationes iudiciorum.' The Curia Regis, of which Parliament is the representative, being always a court of final resort, as well as in some cases a court of first instance, this is a restatement of an accepted constitutional position. The King in Council in Parliament supervised the inferior courts.

Common
law ap-
peals.

The system of appeal was as follows. Error in the Common Pleas went to the King's Bench. The judgements of the Chancellor in his capacity as a Common Law judge could be examined and reversed on a writ of error in the King's Bench, the last instance occurring in the fourteenth year of Elizabeth¹. The Exchequer maintained its independence of the King's Bench, but by statute was directed to produce its record before a Committee of the King's Council².

¹ Dyer, 315, No. 100.

² *Vide supra*, p. 93.

By 14 Ed. III, st. 1, c. 5, a Committee of Council is empowered on complaint of delay to summon any justices and make a judgement; special difficulties to be kept for the next Parliament.

When the Council split off from Parliament in the reign of Richard II, the jurisdiction remained in the House of Lords. The question had been considered, for in Rot. Par. 50 Ed. III, no. 48, the unanimous opinion of the judges as to Common Law appeals is entered, that when error occurred in the King's Bench it should be amended *in Parliament*—by the King in Council in Parliament. The argument was that the Council was excluded for Council was not Parliament, and the Commons were excluded for they were not Council. This view the Commons accepted in the first year of Henry IV.

The Lords' jurisdiction in Chancery appeals was of slow growth, for equitable jurisdiction itself grew slowly. No instance is known before 1621 when the Lords heard *Sir John Bourchier's case*, and a Committee of Privileges considered that the course then taken was unusual if not incorrect.

In 1640 Lady Moulson's petition for the reversal of a decree was referred to the Committee of Petitions.

In 1675 the appellate jurisdiction was disputed by the Commons but without success, and since then has not been questioned.

When the Council separated from Parliament, and the Chancellor and the Common Law Courts were in full work, there was little room for the House of Lords to act as a court of first instance.

In 1668 occurred the case of *Skinner v. the East India Company*. The plaintiff petitioned the King, alleging that as the injury had been committed in India he could get redress in no other Court. The Lords undertook the trial,

The jurisdiction of the House of Lords, on appeals at

Common Law

and Chancery.

and gave judgement for the plaintiff. The Company then petitioned the Commons and a violent dispute was the result, which was only composed by the King acting as mediator, and all records of the proceedings were erased from the journals of both Houses. Since then the Lords have never acted as a court of first instance in civil cases. Only the House of Lords can try questions of right in matters of peerage or dignities connected therewith¹.

In criminal cases.

The criminal jurisdiction of Parliament may probably be now considered of only historical interest. Should it, however, be again invoked, it inheres in and is exercised by the House of Lords.

That jurisdiction may be exercised on two occasions. A Peer has the right if indicted for treason or felony to be tried by his peers: and the House of Commons has the right to impeach any person for any offence, before the House of Lords sitting as judges.

Trial by the Peers.

Its origin

This right if it rest on any written authority rests on the clause of Magna Charta in which occurs the famous phrase ‘iudicium parium.’ These words do not mean ‘trial by jury,’ for at that time trial by jury was unknown. They were used with reference to those cases in which the rights of landholders over their land or to feudal services were in dispute, and meant that the proper tribunal for determining such cases was the *pares curiae*. A suit, for example, in which a tenant *in capite* was defendant should properly come before a court composed of other tenants *in capite*. It is possible that we find here a note of resentment that the causes of great men should be tried before the new fangled royal justices who were, barring their wits, nobodies; but the meaning is fairly obvious, for in c. 21 of the charter it is

¹ *Cowley v. Cowley*, 1901, A. C. 450.

expressly provided that no amercements in court are to be enforced against Earls or Barons except by their Peers.

The *iudicium parium* had no direct reference to the administration of criminal justice; but as a conviction for treason or felony involved the consequences of forfeiture and escheat, it was very natural to desire that charges, at any rate of treason and felony, should be tried by peers. No claim to extend the right was ever seriously made.

In 1341 a Committee of Peers and Sages of the Law was appointed to examine in what cases Peers should be bound to answer in Parliament and in what cases not. It reported, the Sages of the Law not assenting, that in *all* cases, not merely treason or felony, where the King was a party, they must answer in Parliament. An Act was passed accordingly but was shortly afterwards repealed, with the result that the clause in Magna Charta remains the sole written authority for the right, and the more extensive claim has been allowed to drop.

The question whether a peer can waive his privilege of peerage must it seems be answered in the negative. The privilege belongs to the House and not to the individual peer. It is indeed doubtful if it is correct to use the term 'privilege' in this connexion, and whether the question is not one of jurisdiction. Magna Charta said, 'Nullus liber homo capiatur, &c., nisi per legale iudicium parium suorum vel per legem terrae,' and in c. 21 of the charter mentioned above it is provided that no earl or baron shall be amerced but by their Peers, and according to the manner of their offence.

The Crown is thus prohibited from proceeding against the Peer except by judgement of his Peers, and a statutable prohibition cannot be waived.

Though there are some expressions in the early books of

a doubtful character¹, Sir Edward Coke is quite clear on the point², and the same view has been adopted in a debate in the House of Lords on the case of Lord Graves, by the Lord Chancellor, Lord Fitzgerald, and Lord Herschell³.

The procedure in Earl Russell's case was as follows. The Earl was arrested on June 17, 1901, and charged with bigamy. Subsequently the grand jury found a true bill, and the Recorder of London wrote to the House of Lords informing their Lordships of the fact: the King issued a Commission appointing the Earl of Halsbury, L. C., to preside at the trial as Lord High Steward. On July 2 the Earl was taken into custody by the Gentleman Usher of the Black Rod, and it was moved in the House that the bill of indictment found by the grand jury be removed before the House by writ of *certiorari*. On July 18 the trial took place before the Lord High Steward, there being also present about 160 Peers, including all the Law Lords who generally hear appeals, the President of the Probate, Admiralty, and Divorce Division, and ten judges of the King's Bench and Chancery Divisions.

The King's Commission, the writ of *certiorari*, the return thereof, and the indictment having been read, Earl Russell was called upon to plead guilty or not guilty. He pleaded guilty, and was sentenced⁴.

Peeresses by birth or marriage are tried like peers. Coke states the rule thus:—

* If a woman that is noble by birth doth marry under the degree of nobility, yet she shall be tried by her peers, but if she be noble by marriage, and marry under the degree of nobility, she loseth her dignity, for as by

¹ Rot. Parl., 15 Edw. III, 51 (132 b).

² *Inst.*, pt. iii. c. 2, pp. 29-30.

³ Hansard, 3rd series, vol. 310, p. 246.

⁴ 1901, A. C. 446.

marriage it was gained, so by marriage it is lost, and she shall not be tried by her peers^{1.}

If Parliament is sitting the tribunal is the House of Lords presided over by the Lord High Steward who is appointed under the Great Seal *ad hoc*, and the Peers are the judges. If Parliament is not sitting the court is the Court of the Lord High Steward, he being appointed in the same manner.

The Court of the Lord High Steward dates from the first year of the reign of Henry IV. The Earl of Huntingdon in that year was tried before it on an indictment for treason found before the Mayor and Justices of London, Parliament not being in session. He was found guilty and sentenced to be hanged and disembowelled alive², but oddly enough it is uncertain what really happened to him, for next year there is a declaration in Parliament by the Lords Temporal that there should be a forfeiture of his lands, notwithstanding that he had been *beheaded by the King's lieges without due process of law*³.

But in the reign of Henry VII the Court was fully recognized as the Court which sat when Parliament was not in session.

A curious fact is that whereas if Parliament was sitting all Peers could attend as judges, if Parliament was not sitting the Lord High Steward could form his Court by summoning only those Peers whose presence he desired. In the trial of the Earl of Warwick in the reign of Henry VII only twenty-two Peers were present; in the next reign the Duke of Buckingham was tried before nineteen. The presiding judge could thus pack the Court, down to the reign of William III.

¹ *Inst.*, pt. ii. c. 29. Tit. Magna Charta.

² Y. B. Mich., 1 Hen. IV, No. 1, fo. 1.

³ Rot. Parl., 2 Hen. IV, No. 30.

The privilege was, as has been said, of feudal origin. When the feudal doctrine broke down, as the feudal tenures disappeared, a new doctrine of nobility by blood took its place. The privilege was referred to nobility of blood rather than to the possession of a seat in the House of Lords, and it was enjoyed by Lords under age and by the Popish Lords who were incapable of sitting there.

Recognition by statute.

All statutes dealing with treason and felony saved this privilege of the Peerage¹, and the Court of the Lord High Steward remained unchanged.

Partial assimilation of the two Courts.

By 7 Will. III, c. 3, the jurisdiction in cases of *treason* was conferred on the whole body of the Peers entitled to sit and vote *whether Parliament was in session or not*. This Act was not, however, to apply to impeachments, to trials for counterfeiting the coin, the Seals, the Sign Manual, or the Privy Signet. The privilege has been extended in some particulars and confirmed by more recent statutes². It is the statutory duty of the Lord High Steward to summon all Peers who are entitled to sit and vote twenty days before the trial. He is the sole judge and decides all matters of law; the Peers attending act as a jury, and are called the Lords Triers. The verdict is that of the majority, and to procure a conviction there must be twelve who find the accused guilty. The proceedings are on indictment found in the ordinary course and removed by *certiorari*.

If we make an exception in favour of the treasons to which the statute of William applies, it seems that if Parliament were not in session, a Peer could be tried by the Court of the Lord High Steward made up of a limited number of Peers.

¹ 33 Hen. VIII, c. 12; 35 Hen. VIII, c. 2; 1 Eliz. c. 1; 13 Car. II, st. 1, c. 1.

² 2 & 3 Anne, c. 20; 6 Anne, c. 23; 6 Geo. IV, c. 66; 25 & 26 Vict. c. 65.

If Parliament is sitting, any Peer, including those of Scotland and Ireland, has a right, when indicted of high treason, felony, or misprision, to be tried by Peers in the House of Lords; if Parliament is not sitting, in the Court of the Lord High Steward. In the first event the spiritual Lords can attend up to judgement, but they have never been summoned to the Court of the Lord High Steward. The reasons are historical.

The position of the spiritual Lords, and its explanation.

The clergy always contended that they were not amenable to the ordinary courts of law, and that they were only bound to answer in their own ecclesiastical tribunals, and they for a long time made their contention good, although it is doubtful whether high treason was ever covered by 'benefit of clergy': it certainly was not at a later date¹. Consistently with this view a Bishop if arraigned for treason never pleaded his peerage but pleaded his clergy. The churchman claimed entire exemption from all secular jurisdiction whatever, and nothing less.

The Bishop of Hereford, in the seventeenth year of Edward II, when arraigned in the King's Bench for treason, pleaded his 'clergy,' which was allowed by Parliament on the point being referred.

The Bishop of Carlisle, who was implicated in the Earl of Huntingdon's treason, was indicted in the King's Bench; he pleaded under protest of his ecclesiastical privileges, and put himself on the jury and was convicted: but never pleaded his peerage.

The Bishops had struggled to get rid of secular jurisdiction and with this result. They had always rejected the right, which, perhaps as holders in barony they may have had, of being tried by Peers on an indictment. As the Church could not consent to a judgement of blood, they were useless

¹ 2 *Inst.*, 634.

as judges in cases of treason and felony. When the Court of the Lord High Steward was instituted, the claim of the spiritual Lords to be Peers of the Realm was practically extinguished. They never received a summons from the Lord High Steward, for they could not pass sentence. In trials in the House of Lords they were occasionally represented by a lay Peer as their proxy, which Littleton considered right and proper; but whatever the difficulty was, no Proctor was ever nominated for the Court of the Lord High Steward.

In the reign of Henry VII they are known as 'Lords of Parliament' and not as 'Peers of the Realm,' and when the monasteries were dissolved and the Abbots disappeared, only a beggarly remnant of bishops survived, without numbers and without influence.

Cranmer when indicted put himself on a jury of Middlesex, then withdrew his plea and pleaded guilty and never raised the question. Since that trial it has never been suggested that Bishops enjoy a trial by Peers of the Realm.

When the feudal tenures went, with them went the only chance the Bishops had of recovering what they had so long disdained. It is possible that if advanced in time a claim resting on their tenure in barony might have been sustained. But when the feudal tenures were abolished it was too late: the temporal Peers retained their rights merely because the Act which put an end to the tenures saved the benefit.

The Commons' Right of Impeachment.

Criminal proceedings by way of impeachment were taken in the High Court of Parliament before the Lords as judges, the Commons being then prosecutors, and appearing by managers appointed for the occasion, who exhibit articles of impeachment. The Lords vote individually and the majority prevails.

Before the reign of Henry IV the practice when a peer was accused was extremely irregular and unsettled. Bracton apparently only knows of 'appeal' as the method of accusation in such a case. Gaveston was not tried at all, but beheaded by four earls acting under an Article of the Lords Ordainers, which provided that he should be treated as a public enemy if he returned from banishment. The Earl of Carlisle, in the same reign, was degraded from his peerage by a Commission, on the ground that his misdeeds were notorious and that 'our Lord the King records the fact.' He was then sentenced.

In 1304 Nicholas de Segrave was accused in Parliament by the King and pleaded 'guilty,' and the King then consulted the Comites, Barones, Magnates, and others of the Council as to the punishment, but in the end pardoned him¹.

In the reign of Edward III procedure is still uncertain. In the fourth year of the King, the peers, at the special request of the King, heard the case of Simon de Bereford accused of treason, and gave judgement, but protested that they were not bound to try *other persons than peers*².

In the same year, Sir Thomas Berkeley, being brought before the King 'in full Parliament' and charged with the murder of Edward II, said that he was then lying ill in another place and put himself 'de bono et malo super patriam.' And the jury came 'coram domino rege in parlamento suo' and found in favour of the 'alibi': 'ideo idem Thomas inde quietus' (1330 A.D.)³.

In 1376 (50 Ed. III) the case of Lords Latimer and Neville and certain commoners occurred, and is frequently referred to as the first instance of a genuine impeachment in our sense. The Commons petitioned that the articles of

Procedure irregular.

¹ 1 Rot. Parl., 172.

² 2 Rot. Parl., 53.

³ Ibid., 57.

impeachment should be heard by a commission of judges and other lords in London and other suitable towns, to which the King assented¹.

The Lords
no longer
object to
try com-
moners.

In 1387 we find that the Lords have abandoned the view that they are not bound to try commoners, for in an appeal of treason against the Archbishop of York and certain peers and commoners they claimed the right to judge peers *with others* in crimes against the State, and did so. This is worthy of attention, as showing that the doctrine that commoners could be impeached only for misdemeanours had not yet appeared.

Ten years later (1397) the Commons claimed the right to impeach any person when they pleased in Parliament, and recorded their claim on the Parliament roll. The King assented, and on the same day they impeached the Archbishop of Canterbury. The King took time to consider, on the ground that *the Archbishop was a peer of the realm*. The Archbishop made a confession, which was adjudged in Parliament by the King, the Temporal Lords, and Thomas de Percy, *as proctor for the prelates and clergy*², to be a confession of treason. Sentence of banishment accordingly.

Appeals in
Parlia-
ment

In Richard II's reign it was quite common for private persons not members of Parliament to bring criminal accusations in Parliament on which proceedings were taken³, and the practice culminated in a series of appeals and counter appeals brought by the ministers of Richard II against each other in Parliament for high treason as each party got the upper hand. In consequence, the Stat. 1 Henry IV, c. 14 abolished.

was passed which provided that henceforth no appeal should

¹ Rot. Parl., 323-6, 329, 385.

² This procurator or proxy was resorted to in consequence of the Commons complaining that judgements and ordinances had been in the past annulled on the ground that the clergy had not on the particular occasion been represented.

³ Steph., H. C. L. i. 151 sq.

be pursued in Parliament; the only process which was left for the judgement of a peer by peers is either by impeachment or indictment, and that rule remains in force at the present day.

The statute, however, placed no obstacle in the way of a commoner ‘appealing’ a peer. In such a case the appellee was not tried by his peers but like any common person¹. If battle was waged in the appeal, it was a matter of great public expectation, and the King provided weapons, tents, and all the paraphernalia of a fight, and money for the combatants to get whatever was requisite. In the 25th year of Henry VI the Prior of Kilmaine appealed the Earl of Ormonde of treason: the field of battle was prepared, but the King at the instance of ‘certain preachers and doctors’ took the quarrel into his own hands. But all preparations had been made. In the Proceedings and Ordinances of the Privy Council we have the King’s letter to Ormonde permitting him to go for a time and stay near Smithfield ‘for your breathing and more ease,’ and Philip Treher, fishmonger of London, who had by the King’s command been giving the Prior a few lessons in ‘certain points of armis,’ was given £20 by his Majesty² for his pains.

With respect to impeachments against commoners it has

¹ Y. B. Easter, 1 Ed. IV, No. 17, fo. 6.

² Nicholas, vi. 129–40. Things did not always fall out so smoothly. In the same year John Davy, an armourer’s apprentice, appealed his master William Catur of treason, and battle was agreed and a day settled by the Constable and Earl Marshal. We have the King’s writ under the Privy Seal to the Serjeant of the Armoury properly to arm the Appellant, and another letter from the King to Philip Treher, bidding him be ‘intendaunt and of counsaill’ to the said appellant. Seconds were also appointed for the appellee. The battle took place at Smithfield. ‘The master being well beloved was so cherished by his friends and plied so with wine that being therewith overcome was also unluckily slain by his servant: but that false servant (for he falsely accused his master) lived not long unpunished, for he was after hanged at Tyburn for felony.’ Nicholas, vi. 55, 59: and Stow’s Chron. by Howes, p. 385.

Impeach-
ments of
com-
moners.

been pointed out that the Lords at an earlier period were not always consistent in the view they took, and Blackstone¹ laid it down that a commoner could not be impeached but for a misdemeanour. This position, which cannot be maintained now, is possibly, as Mr. Pike suggests, due to the fact that between 1449 and 1621 there were no impeachments at all, proceedings being taken by a Bill of Attainder, which was usually introduced in the Lords, and this perhaps may have obscured the right of the Commons to impeach a commoner.

In *Fitz-Harris's* case² the impeachment was for high treason. The Lords refused to try him, and voted that the proceedings should be at common law. The Commons thereupon resolved that it was their undoubted right to impeach any peer or commoner for treason or any other crime or misdemeanour. Parliament was speedily dissolved, and Fitz-Harris was tried and convicted by a jury. This case was perhaps prejudiced by the fact that the Lords knew that Fitz-Harris had already been arrested and was waiting his trial in the ordinary course, and that if a bill had not been already found against him it speedily would be.

In 1689, in the case of Sir Adam Blair and four other commoners impeached for high treason, the Lords searched for precedents and resolved that the impeachment should proceed.

Law as to
impeach-
ments
generally.

It remains to say that it was settled in *Lord Danby's* case (1678) (1) that a pardon by the Crown could not be pleaded in bar to an impeachment, a rule made statutory by the Act of Settlement, and (2) that the Bishops, though they could in a capital case be present and vote on all preliminary questions, should not vote on the final question of guilty or not guilty. By ancient custom the Bishops never voted on

¹ *Comm.*, iv. 256.

² 8 S. T. 236.

a judgement of blood, and they were expressly excused by the Constitutions of Clarendon.

‘Episcopi sicut caeteri barones debent interesse iudiciis cum baronibus quoisque perveniantur ad diminutionem membrorum vel ad mortem.’

It is almost certain that neither prorogation nor dissolution stops an impeachment. The doubts which were felt produced, on the occasion of the trials of Warren Hastings and Lord Melville, special Acts of Parliament to that effect¹.

Although they cannot be considered as truly judicial proceedings, it is perhaps convenient to allude here to the Bill of Attainder and the Bill of Pains and Penalties. These are nothing more, when passed, than Acts of Parliament for killing or otherwise punishing a man without trial. The great advantage of proceeding by Bill of Attainder was that thus it was possible to get rid of the difficulty, sometimes as in Strafford's case insuperable, of proving that the person whose death was desired had committed any legal offence which would support the capital charge.

Bills of
Attainder
and of
Pains and
Penalties.

¹ 26 Geo. III, c. 96, and 45 Geo. III, c. 125.

CHAPTER XIII

THE KING'S COUNCIL

The Council exercises residuary justice, criminal and civil, through

Ir is only with the judicial functions of this great Court that we are now concerned, and of these some account must be given, and it may be convenient to say that the view which will be presented in the following pages is that up to the time of the Tudor monarchs, what is so familiar to students of Sir H. Maine's works as 'the residuary royal justice,' both civil and criminal, was administered by the Council or the King in Council, and that although a line of cleavage is becoming visible, yet that no actual and permanent cleft occurred between the civil and criminal work till the time of the Tudors, when the criminal side became the province of that committee of the Council which is known to us as the Court of Star Chamber, and the civil side partly became the peculiar and separate jurisdiction of the Chancellor and partly was exercised by the Court of Requests. The generally accepted view is that the cleft occurred much earlier, perhaps as early as the reign of Richard II. It does not seem to me that this view is borne out by the evidence that we have, but this is a matter of opinion, and every one must judge for himself.

(1) the Star Chamber,
(2) the Chancellor,
(3) the Court of Requests.

To judge from the records, the early Norman kings were in matters of law and justice almost absolute. The king's will was law, and his will was testified in affairs of state or justice by parole or writing. It was not necessary that

writing or a *writ* should be used, but it was inevitable that this use should become universal, for thereby the royal message could arrive precise and ungarbled at the most distant part of the country. The authenticity of this message was certified by the Royal Seal which was difficult to imitate.

The Chancellor kept the seal, and with his clerks discharged the manual labour of writing the writs out and sealing them. The writs were sealed on the marble table at the end of Westminster Hall. The Chancellor, being a domestic chaplain, lodged in the king's house; his clerks lived together at a *hospitium* near at hand in Westminster, and when the king travelled, they all went with him, and a *hospitium* was set apart for them at every town where they stopped, and the records were carried on the back of a strong horse, which it was the duty of some religious house to provide.

The Chancellor's
duties at
first secre-
tarial.

'Memorandum quod decimo octavo die mensis Ianuarii quadraginta solidi (i. e. 40s.) quos abbas de Kingeswode liberavit in cancellaria in subvencionem cuiusdam equi emendi ad portandum rotulos cancellariae' (Rot. Claus. 20 Ed. I, m. 11 d.).

But the Kings were not quite absolute. Even Kings are not omniscient, and feudal monarchs were entitled to the counsel and advice of their vassals. The immediate *entourage* of the King consisted of those men on whose sagacity and valour he habitually depended. These form the King's Council. Under such conditions the right to demand advice in difficulties becomes in time barely distinguishable from the obligation to accept or at any rate to ask for it.

The administration of justice is not only a matter of difficulty, but one in which all are interested, and as a fact we find the Council consulted, informally no doubt, but

consulted in some affairs which the King did not desire to decide by himself¹.

The writs originally came from the King in Council, and ran in any franchise, in Chester, Manchester, Wales, Ireland, Poitou and Gascony.

A writ could be registered, and the clerk of the Chancellor kept records, which were used for reference, and supplied precedents. When a complainant came with some common tale of injury which the clerks had heard before, all that was needed was to turn up the record, and copy out the precedent, of the remedial writ. Such a writ was what lawyers now would call 'common form,' and what our ancestors called 'de cursu.' We know that there was a considerable list of these writs, for in the twelfth year of Henry III Letters Patent went to Ireland giving the forms of fifty-one writs 'de cursu' then in force, which were in Ireland to go henceforth under the seal of the Justiciar².

But if a complainant came with a grievance for which there was no appropriate writ, it was not the clerks' business to invent a writ, it was their duty to consult their betters.

His activity. It is plain from the Provisions of Oxford (1258) that the Chancellor, whose duties were secretarial, had been taking on himself the task of framing new writs, and that the Council had observed this activity with disfavour. And naturally, for they recognized that the man who can make a legal writ can make a legal right.

Accordingly in the Provisions the following clauses occur : 'The Chancellor of England swore this—

That he will seal no writ, excepting writs of course,

¹ *Abbot Gausfrid v. Abbot of Marmoutier*, Pl. Ang.-Nor., 122 ; The Case of *Hugh Bigot's widow*, ib. 230.

² *Palgrave, The King's Council*, 16.

without the commandment of the King and of his Council who shall be present.'

'Of the Chancellor—

That he at the end of the year answer concerning his time. And that he seal nothing out of course by the sole will of the King. But that he do it by the Council which shall be around the King¹.

From this it is permissible to draw two conclusions, first, that the Chancellor had, either on his own authority or with that of the King, been sealing novel writs; secondly, that the Council was determined to assert or maintain its supremacy over the *officina iustitiae*, and to make it plain that the royal authority was insufficient without Council authority.

The Provisions of Oxford lived only six years, but that short period seems to have been enough to check permanently any development in the English common law. By statute the clerks in Chancery were encouraged to issue writs 'in consimili casu'², when 'in uno casu reperitur breve, et in consimili casu cadente sub eodem iure et simili indigente remedio non reperitur,' the clerks are to agree in making a new one or adjourn the question to Parliament. But it seems agreed that the results were not such as might have been expected if full advantage had been taken of the Act. It was after all left for the Chancellor to take notice of those wrongs for which the stiffness and obstinacy of the common lawyers refused a remedy.

Before the reign of Edward I, from absence of records, the history of the King in Council is obscure; and even in Edward's reign the line between Council, Parliament, and Curia Regis is uncertain.

Parliament was summoned, not merely for legislation or

Council
and Par-
liament.

The hear-
ing of peti-
tions.

¹ Stubbs, *Sel. Ch.*, 393, 395.

² See Appendix 1.

taxation, but to discuss and hear all sorts of complaints. It was the extraordinary court of Royal Justice.

If the common law was inefficacious, if the party professed inability to sue, or said that he could not get a fair trial by jury or ordinary process, he petitioned Parliament, and we find all these allegations in petitions.

Most petitions referred to king's debts, or royal charters, or to cases where royal rights, e. g. escheats and forfeitures, were concerned, or where Ministers were alleged to be withholding rights which properly belonged to the subject.

The Council in Parliament seems to have delivered solemn judgements, but until a comparatively late period the Chancellor never exercised judicial functions *unless by authority of the Council*, and if acting ministerially he had the assistance of his staff.

When complaint was made by petition of a private wrong, where the ordinary methods were not speedy or effectual enough, or in cases of extraordinary outrage, the Council either summoned the parties before it, or issued a special commission of Oyer and Terminer.

Special Commissions

These commissions were of grace and favour, and could issue from the King in person : but as a fact, frequently and usually, the petition was presented to King and Council, or to the Council, in or out of Parliament. Allegations are made of petitioner's poverty, of the power of his enemies, and of the inefficiency of the common law, and the offenders are usually found amongst the baronage, who are accused of gross outrages, assault and battery.

The answers are various : complainant must betake himself to the ordinary course of law, or wait for the circuit of the justices, or he may have a commission if he pays for it.

not popular.

This irregular issue of special commissions was regarded with great suspicion and disfavour, on the ground that it

opened the door to abuse and oppression, and in consequence it was provided by Stat. of West. II. 13 Ed. I, that

‘A writ of trespass ad audiendum et terminandum shall not be granted before any justices except justices of either bench and justices in eyre, unless it be for a heinous trespass, where it is necessary to provide speedy remedy.’

In Rot. Parl., 8 Ed. II, No. 8, vol. i, p. 290, we find that the Commons allege that these commissions are being granted too lightly and frequently.

So in 2 Ed. III, at the Parliament at Northampton, the same complaint is made.

During Edward III's reign statutes were passed restraining unnecessary applications to the King in Council, culminating in 42 Ed. III, c. 3, that no man be put to answer before justices without presentment or matter of record, or by due process and writ original according to the old law of the land, anything to the contrary to be void.

In 7 Ric. II the complaint is repeated, with the addition that pursuers are not made to swear to the truth of their allegations.

Apparently, in the reign of Henry III, the Council was considered a court of peers within the meaning of Magna Charta, for the ascertainment of the rights of tenants in capite or by barony: it also had original jurisdiction, temp. Edward I and Edward II, in cases concerning the king. In the time of the auditors of petitions, if a remainder was in the king, actions brought against the tenant were often stayed by the judges till the Council granted a writ *de procedendo*. But even then the judges were often restrained from giving judgement *rege inconsulto*.

‘Et bref a les justiz q'ils aillent avant en teu plee

nient contre esteant la dite allegeaunce ; issi q'ils ne aillent mie a juggement sanz conseiller le Roi^{1.}

So the Council was the proper tribunal for trying many of the king's ecclesiastical rights. Thus a suit in the King's Bench relating to the king's free chapel of Boseham is stayed that it may come before Council :—

'Nos ob certas causas coram nobis et consilio nostro propositas volentes dictum negotium coram nobis et dicto consilio nostro et non per alium processum &c. terminari, Vobis mandamus quod processui &c. ulterius faciendo omnino supersedeatis^{2.}'

In ordinary cases defendants were brought in on a writ of *scire facias*. This civil jurisdiction was jealously watched and often petitioned against, but without much success.

but is
always
alleged to
be strictly
sub-
sidiary.
Writ 'ne
exeat
regno.'

The Council claimed prerogative jurisdiction in cases of fraud, deceit and dishonesty, which were not so tangible as to give rise to a prosecution at common law.

Thus writs *ne exeat regno* went against fraudulent foreign debtors who were making off and leaving their debts behind.

But still, with all these complaints, we find that in 27 Ed. III the first statute of *praemunire* was passed, providing that if an appeal be made to the papal court, the penalty of imprisonment during king's pleasure, forfeiture of lands, goods, and chattels, was incurred by such appellants as did not appear before the King and his Council or in his Chancery, or before the justices of either Bench, to answer, &c. From which we are at liberty to infer that the Commons feared the Pope more than the Council.

Council
pro-
cedure.

The modes that the Council adopted of enforcing appearance were not uniform, but it employed :—

(I) Commissions of *oyer and terminer*, and arrest after verdict of jury.

¹ Palg., p. 125.

² Cl. 29 Ed. III, m. 11.

(2) 'Praemunire' writs upon suggestions filed before Council :—

'Edwardus, &c., vicecomitibus London salutem. Quibusdam certis de causis vobis mandamus firmiter iniungentes quod praemunire faciatis H. C. (& others) quod quilibet eorum sub poena centum librarum in propria persona sua sit coram consilio nostro apud W. hac instanti die Martis ad loquendum cum eodem consilio super iis quae eis tunc ibidem exponentur ex parte nostra et ad faciendum ulterius et recipiendum quod per dictum consilium ordinari contigerit in praemissis. Et hoc sub incumbenti periculo nullatenus omittatis. Et habeatis ibi nomina illorum per quos eos praemunire feceritis et hoc breve. Teste meipso, &c.'

(3) 'The writ of Subpoena.' Waltham could hardly have invented it, for he was Master of the Rolls, 5 Ric. II, and the first subpoena is found in Rot. Parl., 38 Ed. III, pt. 1, m. 15 :—

'Edwardus, &c., dilecto sibi Ricardo Spynk de Norwyco salutem. Quibusdam certis de causis tibi praecipimus firmiter iniungentes quod sis coram consilio nostro apud Westmonasterium . . . ad respondendum super hiis que tibi obiicientur ex parte nostra, et ad faciendum et recipiendum quod curia nostra consideraverit in hac parte. Et hoc sub poena centum librarum nullatenus omittas. Teste me ipso apud W.'

The complaints continued, and in 2 Ric. II the Council answer by saying that where the common law cannot have its due course the Council may send for a man and put him to answer for his misprision, and also *compel him to give surety by oath, or in other manner as seems best for his good behaviour*, and not to disturb the common law.

Here we find an allusion to a very important point of council authority, for when the law of frankpledge became obsolete the justices of the peace acquired by their commission a power to hold persons to bail for the preserving of popular

The Council's power of holding to bail.

tranquillity : or a party apprehending injury could sue out a writ commanding sheriff or justices to take bail, and the names of the manucaptors were thereon returned into Chancery.

Then by a slight change the party gave bail in Chancery in the first instance. The last step was that people called before the Council for misdemeanours, &c., were required to give bail either there or before the Council in Chancery.

This power of holding to bail was a very powerful weapon. Thus all the inhabitants of Bury entered into their individual recognizances in £10,000 not to assemble in any illegal meetings nor commit any offence adjudged to be ‘horrible’ by the Council, the justices, or the law of the land.

By 17 Ric. II, c. 6, the Chancellor (in assent to a Commons petition) is to give damages according to his discretion against a complainant who has come before the Council and has made an untrue suggestion, which was quite a novelty.

Then come more petitions, and the answer is always the same. ‘Yes : except in cases where one is poor, and other is so rich that no remedy can be had.’

Baronial jealousy. Meantime in 5 Ed. II a new tribunal was erected by the Provisions of the Lords Ordainers. One bishop, two earls, two barons are to be assigned in every Parliament to hear and determine complaints against king’s ministers.

This took much of the Council’s jurisdiction away ; the royal prerogative went to the baronage, and a baronial or parliamentary committee took the place of a Council selected by the king. These ‘auditors’ had the authority of the Council, though occasional reference was made to the Council itself.

Parliamentary activity. In Edward III’s reign the movement proceeds ; the administration of justice is held to be a matter peculiarly suitable for Parliament, as opposed to Council, for they are now becoming two distinct bodies. So far does it go that the Commons attempt to participate in exercise of remedial

justice ; but this was not persisted in, for in 1 Hen. IV they protested that they had no concern with the judgements of the House of Lords¹. But the power of the Lords in Parliament steadily increased at the expense of the Council, and the legal functionaries not being lords became merely assistants and advisers of the peers, liable to give their opinions when called on.

It is significant of the attitude of Parliament that in the fourteenth year of Edward III a statute was passed dealing with the delays arising from judges differing and sending up for advice when Parliament is not sitting. A permanent commission of Parliament is made to hear and make a judgement, and send it down. At the meeting of every Parliament a prelate, two earls, and two barons are to be chosen, who with the advice of Chancellor, Treasurer, Justices of the two Benches, and others of the King's Council shall direct the justices upon petition to them. Exceptional difficulties to be reserved till the next Parliament. This represents the King in Council in Parliament.

Under the two first Lancastrian kings we see signs of activity in the Commons ; they had got hold of impeachment as their special weapon in 1376², and in 4 Hen. IV the writ of subpoena is made to issue by authority of Parliament, upon the petition of John Attewood and Alice his wife to the Lords and Commons in Parliament³.

In Henry V's reign the Commons take notice of petitions of private individuals to Lords or Council, which often were granted in the form of statutes with the express assent of the whole legislature. Hence arose private Acts of Parliament⁴.

An interesting document that we find was a writ addressed

The King
in Council
in Parlia-
ment.

Origin of
private
Acts of
Parlia-
ment.

¹ Rot. Parl., 1 Hen. IV, No. 79.

² Impeachment of Lords Latimer and Neville and four commoners.

³ See Palgrave, *The King's Council*, 71, for the petition with the writ at the end of it.

⁴ See Hallam, iii. 92.

to the sheriff of a county, by and with consent of the Commons, commanding him to make proclamations that the party should come sometimes before the King's Council to answer such matters as should be alleged against him¹, sometimes before the King's Bench².

Meanwhile the Council never loosed the reins, but gradually set its affairs in order.

Separation
of
Council
and
Par-
liament.

Under Richard II we may say that the Council definitely separated from Parliament.

Petitions now went into three classes :

1. Bills of Grace answered by King in person.
2. Bills of Council answered by Council.
3. Bills of Parliament answered only with assent of Parliament.

We know now that in 13 Ric. II the Lords of Council met between 8 and 9, business of the King and realm to be dispatched first, common law matters to go to the judges, &c., and the bills of the *lesser* people ('du poeple du meindre charge') are to be examined and dispatched before the Keeper of the Privy Seal and such of the Council as should be then present³. This it is plausibly suggested is the origin of the claim of authority of Privy Seal in the Court of Requests, to which bills went either because the plaintiff was very poor or the king's servant.

During the civil commotions which prevailed in England during and after the reign of Richard II the Council gained ground, and probably the long absence of Henry V from England helped them.

¹ Rot. Parl., 4 Hen. V, No. 15, vol. iv, p. 99.

² Ibid., pp. 164-5.

³ 'L'ordinance faite sur le gouvernement a tenir par le counsail du Roi. Primierement que les seigneurs du Consail se taillent estre au consail parentre oyt et noef de la clokke ou plustard,' &c. (*Bib. Cott. Cleopatra*, F. iv, p. 1. 1).

But on Henry's death, his son Henry VI being a minor, the baronage seized the government, the Commons, by a great disenfranchising statute, became their nominees, and a Council was nominated by the Lords during the minority mainly from themselves.

The Lords of the Council then produced a schedule for the 'good of the gouernance of the land,' in which *inter alia* was :

'Item, that alle the Billes that shal be putt unto the Counsail, shuld be onys in the woke att the lest, that is to seie, on the Wednesday redd before the Counsaill and their ansueres endoced by the same counsaill, and on the Friday next folowyng declared to the partie suying Item, that alle the billes that comprehend materes terminable atte the commune lawe that semeth noght fenyd be remitted there to be determined, but *if so be that ye discretion of the counsaill feele to greet myght on that ooside, and unmyght oo that othir.*'

This exception seems sufficiently large, but it was not large enough, for in 1426 another clause added 'orellus other cause resonable that shel moeve hem¹.' Moreover the clerk of the Council, as far as he can, 'shall espye which is the porest suyteurs bille and that first to be redd and answered' and the King's serjeant to help him without fee².

A certain amount of light is thrown on the state of the country at this time by two cases which are preserved in Nicholas. In the fifth year of Henry VI³, one William Wawe, a highwayman 'quidam iniquitatis filius,' had broken out of prison and robbed churches. The Council offers £100 to any one who will produce 'coram nobis ipsum seu corpus aut caput ipsius si interfectus fuerit.' He took sanctuary at Beaulieu Abbey, and the abbot was instantly called on to produce his

The
Council
seized
by the
Baronage.

The
Council
and public
order, jus-
tice, and
police.

¹ Nicholas, *Proceedings of Privy Council*, iii. 214.

² Rot. Parl., 2 Hen. VI, iv. 201; Nich., iii. 148.

³ Nich., iii. 257.

franchises, ‘si quas habeat de retinenda persona Willi Wawe,’ heretic, highwayman, traitor, &c. What happened does not appear, but William was shortly afterwards arrested and satisfactorily hanged.

In the seventh year of Henry VI¹, one John Roger confesses that he has infringed the statute regulating export of wool. All the judges are summoned to advise whether he should be let off with a fine or sent to trial. The judges say ‘fine him, for the jury will probably be bribed by the said Roger.’ Fined accordingly 200 marks *or more if he can pay.*

Whether it was that towards the end of the long war there were signs of anarchy appearing in the country, and the ordinary administration of justice was hindered, which seems very probable, or whether it was that the Council knowing the subservience of the Commons desired to put their authority on a statutory basis, an Act² was procured which must have been of some value.

It recites that complaints have been made to the King of great riots, extortions, and oppressions ; that his writs under the great seal and letters of privy seal summoning offenders before Chancery and Council are frequently disregarded, and it enacts that the Chancellor shall in such case issue writs of proclamation to the sheriffs of the county, the adjoining county, and of London, the proclamation to be made three times, with heavy penalties of forfeiture, fine, and disability on contumacy. It was a seven years’ statute only, but the doctrine that the disobedience to a privy seal or a subpoena was a contempt against the King became well settled. Outlawry could not issue on this new process, so it was enforced by a ‘commission of rebellion.’

The very next year we find a royal letter to the Earls of Salisbury and Northumberland³ reminding them that they

¹ Nicholas, *Proceedings of Privy Council*, iii. 313.

² 31 Hen. VI, c. 2.

³ Nich., vi. 159.

are in the Commission of the Peace, yet that they had taken upon them 'to make the greatest assembly of our liegemen that ever was made,' and threatening that if any one perished in consequence they should be 'so chastised that both ye and they and all our subjects shall have matter and cause to eschew to attempt anything like hereafter.'

Lord Egremont for the same conduct is admonished to 'surcease such novelries' and to keep the peace¹.

There is no difficulty in believing that in these stirring times the office of sheriff was no bed of roses. Sheriffs in fact could not be found. On December 9, 1455 (34 Hen. VI), the Council writes to Hugh Lowther and tells him that he must be Sheriff of Cumberland on pain of £2,000 fine, the King not admitting 'any excusation'².

Sir F. Palgrave gives two cases from which we can see the sort of complainant and complaint which came before the Council and what the Council did.

1. John Rukke, husbandman, of Essex, complains of false imprisonment, and wrongful disseisin.

He gets (*a*) writ of habeas corpus cum causa returnable in Chancery for the imprisonment. This would produce the plaintiff; (*b*) subpoena returnable before King and Council for the wrongful disseisin. This would produce the defendant.

2. John, Lord Strange is complainant.

Roger Kynaston, who was second husband of plaintiff's mother, unlawfully retained certain lordships on the Welsh marches in which his wife had only a life interest. There had been an arbitration and award against Kynaston; Kynaston would not obey it being very powerful. Strange came to the Council. Letters missive under the signet were issued; Kynaston paid no attention; then letters issued under the privy seal; Kynaston waylaid the messenger, John Gough,

¹ Nicholas, *Proceedings of Privy Council*, vi. 161.

² Ibid., vi. 271.

and sorely beat him. Then issued a writ of proclamation ; the defendant did not come in.

A commission of rebellion was then directed to the Earl of Shrewsbury, Lord Herbert, and the Sheriff of Salop.

They do not seem to have been very active, so plaintiff comes and asks for a privy seal to issue to them directing them to execute their commission, with concurrent writs of proclamation to the sheriffs and justices of Salop, Flint, Hereford and Chester directing them to assist in arresting Roger, and that none is to help him on pain of being put out of the King's protection.

And on November 12, 7 Ed. IV, it was ordered by the King and Council sitting in the 'Starre Chamber' that the Chancellor should make these writs.

The true
value of
the
Council
jurisdi-
ction re-
cognized.

It is worthy of note that although during the reigns of Edward III, Richard II, Henry IV, V, and VI, petitions were frequently presented on the subject of the Council's jurisdiction, yet the objections seem rather to have been against the methods by which and the occasions when the jurisdiction was exercised, than against the jurisdiction itself.

They were mainly aimed at the arrest of persons by the Council's pursuivants on mere suggestion, which might be unfounded, and was possibly malicious. This explains the provision we have mentioned, that the Chancellor shall mulct in damages those who make untrue suggestions. Moreover, it is quite clear that the Commons were sensible of the value of this jurisdiction, if it were employed on the proper occasions, as we gather from the petitions temp. Richard II where it is prayed that people may not be forced to answer finally in the Council in matters cognizable by the ordinary courts, but that they should be concerning oppressions.

From the accession of Henry VII the legal history of the Council tends to become the history of its Committees—for

such they were—the Courts of Star Chamber and Requests. The Council itself seems gradually to have discarded its purely judicial functions¹: it is by the end of Elizabeth's reign almost entirely immersed in political and foreign affairs. What power, if any, it still had to call to itself purely judicial matters from the Star Chamber, we can only conjecture. We may safely conclude that being without assistance from professional lawyers, it would have no inclination to meddle with what it did not sufficiently understand. From some of the entries in the Register it looks as though the Council sat in vacation—when the Star Chamber was 'up'—without the assistance of the judges, and took business, perhaps urgent business, which 'Her Majesty's Court of Star Chamber,' as we find it styled in 1588², would otherwise have dealt with.

Thus at Westminster, on July 14, 1562, the case of 'certaine scollers of the University of Oxford' came up. Six of the 'chiefest of the committers of this disorder' are to be sent 'hither,' the rest to be bound personally the first day of next term *in the Star Chamber*³.

On May 1, 1567, at Westminster, a jury of London being this day before the Lords were commanded to appear before *their Lordships* the morrow next after the last day of the Term in the Star Chamber, to be there further ordered⁴.

Some of these cases may have had a political aspect, and required handling by the statesman rather than the lawyer.

Though the statute⁵ which abolished the Star Chamber restricted the jurisdiction of the Council, it did not affect the right of a suitor, in one of the foreign dependencies of the Crown, to apply for justice to the King in Council.

Jurisdiction still remaining in the Privy Council.

¹ A gap in the Council Register which extends from the 13th year of Henry VI to the 32nd year of Henry VIII makes the stages of this process obscure.

² On Jan. 28.

³ Dasent, vii. 114.

⁴ Ibid., 347.

⁵ 16 Car. I, c. 10.

Civil

Petitions from the Adjacent islands and the Plantations were thus unaffected. And down to 1833 such petitions were heard by an open committee of the Privy Council; while in 1832 the jurisdiction of the Court of Delegates in ecclesiastical and admiralty appeals was transferred to it.

It has been suggested that this Privy Council jurisdiction over foreign dominions has grown by analogy from the position of the Channel Islands which, as part of the Duchy of Normandy, retained their judicial procedure, are not bound by Acts of Parliament, and from whose courts error never lay to Parliament but to the successor of the Dukes of Normandy and his council.

and
Criminal.

One degree of criminal jurisdiction still adheres in the Privy Council. If the sovereign establishes courts of justice beyond the realm by prerogative, appeal lies to the sovereign as to the fountain of justice, unless taken away by statute or charter¹.

The Judicial Committee of the Privy Council was formed in 1833, and its composition has since been frequently modified by statute.

The statute creating it² provided that this Committee should consist of the President of the Council, the Lord Chancellor, such members of the Privy Council as should from time to time hold the office of Lord Keeper, judge in the King's Bench, Common Pleas, or Exchequer, Master of the Rolls, Vice-Chancellor, judge in the Prerogative Court of Canterbury, judge of the High Court of Admiralty, Chief Judge in Bankruptcy, and all Privy Councillors who had in the past held any of the above offices: provided that His Majesty could from time to time by his Sign Manual appoint two other persons being Privy Councillors to be members of the said Committee.

Two members of the Privy Council who shall have held

¹ *Regina v. Bertrand*, L. R., 1 P. C. 529. ² 3 & 4 Will. IV, c. 41.

the office of judge in the East Indies or in any of His Majesty's dominions beyond the seas, and who being appointed for that purpose by His Majesty shall attend the sittings of the Committee, shall receive £400 a year for their expenses.

In 1871 the Crown was empowered by statute¹ to appoint within twelve months under the Sign Manual four persons to act as members of the Committee, and from time to time within two years to fill any vacancies occurring. Such persons must, when appointed, be or have been judges of the Superior Courts at Westminster, or a Chief Justice in Bengal, Madras, or Bombay. The appointed salary was £5,000 a year.

The term 'Superior Courts at Westminster' means the Superior Courts of Law and Equity at Westminster, inclusive of the Courts of Probate for Divorce and Matrimonial Causes, and of Admiralty.

In 1876 the famous Appellate Jurisdiction Act² was passed, which not only amended the composition of the House of Lords as a Court of Appeal by empowering the Crown to create life peers as Lords of Appeal in Ordinary, but indicated a policy of assimilating the two great tribunals of appeal in the British Empire. This policy seems, in view of recent constitutional and imperial developments, at any rate in its original features, to be abandoned.

The Act provided that the new Lords of Appeal in Ordinary, of whom two were to be appointed, should, if members of the Privy Council, be members of the Judicial Committee, and that it should be their duty to sit and act, and further, after reciting the powers given to the Crown by the Act of 1871, to appoint four paid judges of the Judicial Committee, went on to provide that on the death or resignation of two of these the Crown might appoint a third Lord

¹ 34 & 35 Vict. c. 91.

² 39 & 40 Vict. c. 59.

of Appeal in Ordinary, and on the death or resignation of the other two, a fourth.

Accordingly there are now four Lords of Appeal in Ordinary.

In 1881¹, it was enacted that every person holding or who has held the office of Lord Justice of Appeal in England shall, if a Privy Councillor, be a member of the Judicial Committee.

In 1887² it was enacted that the Judicial Committee shall include such Privy Councillors as shall hold or have held 'high judicial office' within the meaning of the Appellate Jurisdiction Act, 1876, and this Act.

'High Judicial Office' means Lord Chancellor of Great Britain and Ireland, a paid Judge of the Judicial Committee, or a judge of the Superior Courts of Great Britain and Ireland, i. e. in England of the High Court of Justice and the Court of Appeal, or the Superior Courts of Law and Equity as they existed before the Judicature Act, in Scotland of the Court of Session, in Ireland of the Superior Courts of Law and Equity in Dublin. It also includes the office of a Lord of Appeal in Ordinary, and of a member of the Judicial Committee.

In 1895³ it was enacted that if any person being or having been Chief Justice or Judge of the Supreme Court of Canada, or of a Superior Court of any province of Canada or of New South Wales, New Zealand, Queensland, South Australia, Tasmania, Victoria, Western Australia, Cape of Good Hope, and Natal, or of any other Superior Court in the Crown's Dominions named in that behalf by the Crown in Council, is a Privy Councillor, he shall be a member of the Judicial Committee. The number of such persons shall not exceed five at any one time.

¹ By 44 Vict. c. 3.

² By 50 & 51 Vict. c. 70.

³ By 58 & 59 Vict. c. 44.

It can hear civil and criminal appeals from the colonies, Indies, and foreign dominions¹. But as regards appeal in criminal cases 'the rule has been repeatedly laid down and invariably followed that Her Majesty will not review or interfere with the course of criminal proceedings unless it is shown that by a disregard of the form of legal process or by some violation of the principles of natural justice or otherwise, substantial or grave injustice has been done²'.

Although the Privy Councillors as committing magistrates (and every Privy Councillor is in the commission of the peace for every county in England) are constitutionally empowered 'to inquire into all offences against the government and to commit the offenders to safe custody³', it is now customary to send such offenders like ordinary criminals before the magistrates in the usual way.

¹ It is believed that the only instance of the explicit abridgement of the right of the subject to petition the Crown for redress of grievances is found in the Australian Constitution Act (63 & 64 Vict. c. 12, § 74).

² *Ex parte Deemning*, 1892, A. C. 422.

³ Blackstone, *Inst.*, i. 230; *Comm.*, 231.

CHAPTER XIV

THE STAR CHAMBER

In view of the doubt which surrounds the relationship of the Council to the Star Chamber it may be useful to indicate certain facts which are, so far as the records go, beyond dispute.

The Proceedings and Ordinances of the Privy Council from the tenth year of Richard II were published under the direction of the Commissioners of Public Records by Sir H. Nicholas, and are now continued under the editorship of Mr. Dasent, C.B.

Unfortunately the Council Register or Book of the Council stops abruptly in the thirteenth year of Henry VI and begins again in the thirty-second year of Henry VIII. From that date we have the Council records down to the year 1596¹.

Mr. Baildon's Reports of Cases in the Star Chamber begin in 1593 and go down to 1609. The writer of this book was John Hawarde of the Inner Temple, Bencher 1613, Reader 1625, who apparently sat in court, and took notes, which he afterwards wrote up².

*Star
ber:
ed.* The Star Chamber was built conveniently 'near the Receipt,' i. e. the Treasury. It was begun in 1347 and finished the next year, and immediately became the Council room.

¹ The Camden Society has also published *Cases heard in the Star Chamber*, 1631-2, vol. 39, N. S.

² The MS. is in the collection of Alfred Morrison, Esq., and is mentioned in *The Ninth Report of the Hist. MSS. Comm.*, p. xvii, and App. II, p. 406.

The name ‘Sterred Chamber’ is first found in or about 1348 in the tilers’ accounts of 21 & 22 Ed. III¹.

Down to the Tudor times, it may be said with confidence that the words ‘in the Star Chamber’ are a mere geographical expression ; they were not part of the ‘style’ of the court. The minutes of the Council show that when they were at Westminster they usually sat there. So in the Issues of the Exchequer of 12 Ric. II there is an entry of seven shillings paid to Henry Winchester for a Kalendar purchased from him for the king’s use, viz. to be kept for the use of the Lords of the Council in the Star Chamber, and again in 1 Hen. IV there is another payment for rich cloths and cushions provided for the advantage and accommodation of the Lords and nobility appointed to consult together on behalf of our Lord the King in the Star Chamber.

In considering the relations between the Privy Council and what is generally known as the Court of Star Chamber it is useful to bear in mind the previous history of the Council. It has been well remarked that the king’s continual council at one time exercised a more extraordinary combination of legislative and executive functions than any other political assembly has perhaps claimed for itself. In addition to its supreme and exclusive title to the office of chief advisers to the Crown, and chief instruments of the royal will as displayed in acts of government, it arrogated to itself for a long period an almost illimitable right of judicial interference. Before the jurisdictions of the courts of law and equity were marked out there was scarcely a department of state which was not in a greater or less degree subject to its immediate control. No rank was too exalted or too humble to be exempt from its vigilance, nor any matter too insignificant for its interference².

Relations
of Coun-
cil to
Star
Chamber.

¹ Queen’s Remembrancer’s Ancient Miscellanea ⁸⁷³ ₂₂.

² Nicholas, *Proceedings and Ordinances of the Privy Council*, ii, Introduction.

As a matter of history we know that the Council, while throwing off the courts of common law, remained the depository of the residuary royal jurisdiction in civil and criminal matters, that on the civil side this jurisdiction became in the main the Chancellor's system of equity, while the criminal jurisdiction remained in the hands of the Council as such. The differentiation of function was, however, a gradual and slow process. For the common law judges, who were at first members of the Council, but who seem to change their relationship to the Council and to become legal assessors rather than members, for a long time sat with the Council¹ for its guidance, and also down to the time of Cardinal Wolsey were formally or informally associated with the Chancellor.

Differentiation spells specialization. The judges had their own proper work to do, while the Council's activities became essentially executive. It was in virtue of its great executive powers that it made its mark on the administration of justice. One might perhaps say that its functions were not so much those of a judge as of a police magistrate. Coke² observes that the Council in ancient times rarely sat judicially except for summons and exorbitant causes and not such as ordinary courts could condignly punish, lest it should draw the king's council from matters of state to hear private causes and the principal judges from their ordinary courts of justice. It is significant that the 'articles of government' of Council in 2 Hen. VI³ find it necessary to provide for the presence of judges *where the Council is not learned enough*, and that similar provision is made in the articles of 5 Hen. VI and 8 Hen. VI.

This perhaps marks a change, for Coke says that 'in 28 Ed. III it appeareth that the returns "coram nobis" are

¹ So on Feb. 10, 1403, there were present 'les iustices de lun Banc et de l'autre' (Nich. i. 197).

² *Inst.*, iv. c. 5.

³ *Rot. Parl.*, iv. 201.

in three manners ; “coram nobis in Camera” (which it was said was afterwards called Camera Stellata), “coram nobis ubicunque fuerimus in Anglia,” which is the King’s Bench, and “coram nobis in Cancellaria.”

In the precedents which Coke preserves from Ed. III onwards the style of the court is ‘coram rege et consilio,’ sometimes the words ‘in the Star Chamber’ being added.

Down to the Tudor period the composition of the Council is free from doubt. It was the king, the great men, and the judges. Then comes the celebrated statute 3 Hen. VII c. 1, the object and effect of which will be considered below¹. Lastly, having passed through the obscurities of the Tudor period, we reach the time of Coke and Bacon, who agree in describing from personal knowledge a Court constituted remarkably like the pre-Tudor Court of Henry VI.

‘The Judges of the court are the Grandees of the Realm, the Lord Chancellor, the Lord Treasurer, the Lord President of the King’s Council, and the Lord Privy Seal, all the Lords Spiritual and Temporal and others of the King’s most honourable Privy Council, and the principal judges of the realm and such other Lords of Parliament as the King shall name . . . And the court cannot sit for the hearing of causes under the number of eight at least. This court . . . doth keep all England quiet.’

‘It is, or may be, compounded of three several Councils :

‘(1) Of the Lords and others of His Majesty’s Privy Council, who are *always judges without appointment*.

‘(2) The Judges of either Bench and Barons of the Exchequer are of the King’s Council for matters of law ; and

¹ It is unlucky that we have at present no records either of the Privy Council or of the Star Chamber to show the state of things, which preceded and followed the passing of the Star Chamber Act.

the two Chief Justices, or in their absence two other Justices, are *standing judges of this Court*.

‘(3) The Lords of Parliament are properly *De magno consilio regis*, but neither these being not of the King’s Privy Council nor any of the rest of the Judges or Barons of the Exchequer are standing judges of this Court¹.’

The style of this Court (which is commonly and conveniently called the Star Chamber) is according to Coke ‘*coram rege et consilio*.’

So Bacon says ‘The Court of Star Chamber is compounded of good elements, for it consisteth of four kinds of persons, counsellors, peers, prelates, and chief judges².’

This Court of Coke and Bacon is in reality and style the same court which existed before the reign of Henry VII.

Some light is thrown on the relations during the Tudor period of the Council to the Star Chamber by the Proceedings of the Privy Council, and by Hawarde’s notes, above referred to, which seem to negative the suggestion that these Courts exercised rival jurisdictions.

In 1596 the following persons formed the Privy Council: Whitgift (Archbishop of Canterbury), Puckering (Lord Keeper; died Ap. 30), Lord Cobham, Sir William Cecil (Lord Treasurer), Sir Robert Cecil, Sir Henry Carey (Lord Chamberlain), Earl of Essex (Master of Horse), Sir John Fortescue (Chancellor of Exchequer), Lord Howard of Effingham (Lord High Admiral), Egerton (Lord Keeper), Lord Buckhurst (Lord High Butler), Sir Francis Knollys (Treasurer of the Household), Sir T. Heneage (Chancellor of the Duchy), and Sir J. Wolley (Latin Secretary; died in February).

In that year, down to and including May 21, Mr. Hawarde gives ten sittings in the Star Chamber. With the exception

¹ Coke, *Inst.*, iv. c. 5.

² *Life of Henry VII* (Spedding), vi. 85.

of the three last-mentioned Councillors all came and sat in the Star Chamber, at some time or other. Some Councillors attended with great regularity. The Lord Keeper Puckering attended every meeting till his death, when his successor Egerton attended all the rest. Lord Buckhurst was very nearly as good and so was the Archbishop of Canterbury. The Chancellor of the Exchequer only missed one. Sir William Cecil came thrice, the others once or twice.

Amongst those who were most regular in attendance at Council are the Lord Keeper, Lord Buckhurst, the Archbishop, and the two Cecils.

But in the Star Chamber we find others *who are not of the Privy Council*, viz. Anderson C. J. of the Common Pleas, Popham L. C. J., and Peryam C. B. of the Exchequer, Walmesley J., and the Bishop of London.

Of these the two Chief Justices and the Bishop are models of regularity.

An inspection of the dates shows that the two meetings were never allowed to clash, but that if Council business had to be done on a Star Chamber day, the Council came and did it in the Star Chamber either before or after the more strictly legal business.

At the time we are dealing with, the early part of 1596, the Court was at Richmond, and moved to Greenwich somewhere about April 20.

The subjoined diary, compiled from the two records, speaks for itself :—

- Jan. 25. Council at Richmond.
- ,, 28. Star Chamber Court.
- ,, 30. Council and a Court at Star Chamber.
- Feb. 1. Council at Richmond.
- ,, 2. The same.
- ,, 3. The same.

- Feb. 4. Star Chamber Court.
 ,, 6. The same¹.
 ,, 8. Council at Richmond.
 ,, 11. Star Chamber Court².
 ,, 13. The same.
 ,, 15. Council at Richmond.
- Ap. 29. Star Chamber Court, and letters signed in
 Council by some of those who formed the
 Court.
- May 9. Council at Greenwich.
 ,, 12. Star Chamber Court.
 ,, 14. Council at Greenwich.
 ,, 16. The same.
 ,, 19. Council and Court at Star Chamber.
 ,, 21. Star Chamber Court.
 ,, 24. Council in Star Chamber.
 ,, 25. Star Chamber Court.

The following extracts from the Council minutes leave no doubt as to the allocation of business between council and court. It is the old story over again. The Council does not desire to act in judicial matters without the best professional assistance:—

At Hampton Court, Jan. 21, 1592.

‘Whereas there is depending before their Lordships a cause in controversy between Mr. Doctor Caesar, Judge of H.M.’s Court of the Admiralty and Philip Corsini, merchant stranger, wherein they mind to proceed forthwith and so end and determine the same, their pleasure is that the parties with their witnesses and learned counsel on both sides shall attend their

¹ On this date some formal business was done in Council, but no names of Councillors are given as present, and the same thing happens on the 12th.

² On the 11th and 13th, some appearances before the Council were entered, but this could be done before a clerk according to Coke.

Lordships' on Friday next at the Star Chamber in the afternoon, when some of the Judges shall be present to give their opinions upon such points of the controversy as their Lordships shall find requisite for their better direction in the ending and ordering thereof.'

At the Court at Croydon, May 14, 1593.

A commission having issued to examine into some disturbances regarding some weirs on the Trent, their Lordships 'finding the examinations of either side much different and the matters meet to be censured and decided by ordinary course of justice,' finally order that all questions grown of the said weir shall be referred to *the judicial trial of the Star Chamber and other her Majesty's Courts of Record at Westminster, . . . and that the same shall be no more dealt in at the Council Board.*'

At the Court at Nonesuch, June 5.

An order to magistrates of Notts. to release one Bulby from gaol, that he may attend the prosecution of this case in the Star Chamber as the matter of the weir is 'judicially depending' there.

At Nonesuch, June 19, 1593.

A letter to Lord President and Council of the Marches of Wales. One Wheler had complained of perjury in the Dean of Worcester and others, whereby he had been fined £5, and for trial thereof 'a bill is exhibited into the Star Chamber before us where the same is to receive hearing.' Process is to be stayed in the Court of Marches for levying the fine, till the matter is heard and determined.

At Richmond, Dec. 13, 1595.

A letter to the Lord Warden of the Middle Marches near Scotland. Certain people have committed misdemeanours fit to be answered here; the Lord Warden is required to

take bonds for ‘their appearance *before us* the first setting day in the Star Chamber next term.’

In 1612 (10 Jac.) the same relations are exhibited in the curious proceedings against the Countess of Shrewsbury¹ before a ‘select council’ for a contempt in refusing to answer fully before the Privy Council. The meeting was held at York House before the Lord Chancellor, the Archbishop, the Duke of Lennox, the Lord Privy Seal, the Lord Chamberlain, the Earls of Worcester and Pembroke, Viscounts Erskine and Rochford, Lords Zouch, Knollys, and Wooton, the Chancellors of the Exchequer and the Duchy, the Lord Chief Justice, the Master of the Rolls, Coke C.J. and Tanfield C.B.

The majority of the Council were there, including the most important members, with the chief judges added.

It is stated that this selected Council is to express what punishment the offence justly deserved if *it be judicially proceeded with within the Star Chamber*, this procedure being out of the king’s mercy and grace that the lady might submit to the king without any punishment in any court judicially.

It was resolved that *if any punishment should be given in the Star Chamber it should be a fine of £2,000 and imprisonment during pleasure.*

In 1631 (7 Car.) the Privy Council according to the Register numbers forty, six or seven being Scotch peers. Of them fifteen are present in the Star Chamber to hear the case of *Falkland v. Mountmorris and others*². This, however, was a specially interesting case, the complainant, Lord Falkland, himself a Privy Councillor and Lord Deputy, having been accused of complicity in what looks like a judicial scandal in Ireland. On other occasions the

¹ 2 *State Trials*, 769.

² Star Chamber Cases, 1631-2 (Camden Soc., vol. 39, N.S.).

Attendance was scanty, sometimes not more than five were present, two of whom were Chief Justices¹.

What then was the object and the effect of passing what known as the Star Chamber Act of Henry VII? It runs follows—‘The King our said Sovereign Lord remembereth by unlawful maintenance, giving of liveries, signs, and ens, and retainders by indentures, promises, oaths, writing otherwise embraceries of his subjects, untrue demeanings sheriffs in making of panels, and other untrue returns, by taking of money, by juries, by great riots, and unlawful assemblies, the policy and good rule of this realm is almost perished and for the not punishing of these inconveniences by occasion of the premises little or nothing may be done by inquiry, whereby the laws of the land in execution may take little effect, to the increase of murders, robberies, juries, and unsueties of all men living, and losses of their lands and goods, to the great displeasure of Almighty God. Wherefore it is ordained for reformation of the premises by authority of the said Parliament that the Chancellor and easurer of England for the time being and Keeper of the King’s Privy Seal or two of them, calling to them a bishop or a temporal lord of the king’s most honourable council, or the two Chief Justices of the King’s Bench and Common Law for the time being or two other justices in their absence, on bill or information put to the said Chancellor for the King or any other, against any person for any misbehaviour before rehearsed, have authority to call before them by writ by Privy Seal the said misdoers, and them or other by their discretion by whom the truth may be known to examine such as they find therein defective to punish them after their demerit, after the form and effect of statutes thereof de, in like manner and form as they should and ought to

Effect
3 Hen.
VII, c.

Star Chamber Cases, 1631-2, under date Ap. 20, 1632 (Camden ., vol. 39, N. S.).

be punished as if they were thereof convict after the due order of the law¹.

From the researches of an American lady² in the Harl. MS. 6811, Art. 2, and Add. MS. 4521, Art. 9 and Harg. MS. 216 it seems that in his two first years Henry VII sat at least ten times with his Council in the Star Chamber (on one occasion (Feb. 9) the Council numbering twenty-six, including Hody A.-G.), and considered riots and political business.

In the Year Book 2 Ric. III, fos. 2 and 11, we find the cases of the Spanish merchant, and the Waterford merchants, ‘coram rege et consilio.’ The opinions of all the judges were taken in *Camera Scaccarii*. On the other hand, in Y. B. 2 Hen. VII, Mich. T., fol. 9 the justices of the Common Bench desiring advice ‘surrexerunt et allerent al Chancelier & Seigniors de Star-Chambre.’ It may well be that Henry, who was a frugal man, intended to make a small judicial committee, with professional assistance, seven persons in all (to whom Henry VIII added the Lord President³), to take judicial as opposed to high political work, and so leave the rest of the council and the rest of the judges free to attend to their proper business. The offences named in the statute were precisely those that the common law had failed to cope with. It may be only a coincidence, but the new court bears a considerable resemblance to the Court of Exchequer Chamber as established by 31 Ed. III, st. 1, c. 12.

For a short time, it seems, the statute was strictly con-

¹ That the preamble of the statute was truthful we have some evidence in a report in the Y. B., 7 Hen. VI, 9. An assize in Cumberland was adjourned to London, and the reason being asked it was said that it was a great matter, and that the parties came with great routs of armed men, ‘plus semble pur veneur a bataille que al assize.’

² Miss Cora Scofield, of the University of Chicago, who has written a thesis on the topic, which my friend Mr. Leadam has shown me.

³ 21 Hen. VIII, c. 20.

strued; we may note the decision¹ which Coke disapproved that only the Chancellor, Treasurer, and Lord Privy Seal were judges by the statute 3 Hen. VII, that it was 'error' if the two councillors and justices were not called in, but that they were *assistants et aidants et nemy iuges*, yet next year, on June 2, a court was formed of the Chancellor, Treasurer, the two Chief Justices, and the Chief Baron when an injunction was granted against wearing liveries².

I am indebted to Mr. Leadam, who is editing a volume of Star Chamber cases for the Selden Society, for a note of a case in 1508 (13 Hen. VII) concerning a conflict of jurisdictions at Shrewsbury, where the court was composed of the Archbishop of Canterbury, Rede C.J., Brudenell, Fisher, Butler, and Kingsmill J.J., all of the Common Pleas, Tremayle J. of the King's Bench, and the Prior of St. John of Jerusalem.

In fact, so far as we know at present, there is no record of a court constituted in precise accordance with the terms of Henry's statute. If it ever lived its life was short, and it died before it was christened. The statute gave its child no name, though in the Parliament Roll there is a heading to the statute of 'Pro Camera Stellata.' In *Chambers'* case³ where the defendant, who had been committed to the Fleet prison by the Star Chamber, for words he used at the Council table, being brought up on his *habeas corpus*, prayed deliverance because st. 3 Hen. VII, c. 1, 'which is the foundation of the Court of Star Chamber, doth not give them any authority to punish for words only, all the court informed him that the Court of Star Chamber was not created by that statute, but was a court many years before,' herein agreeing with Coke and Bacon⁴.

¹ Y. B. 8 Hen. VII, 13.

² Liber Intrationum. Add. MS. 4521 and Harg. MS. 216.

³ 4 Cro. 168.

⁴ See also Hudson's *Treatise on the Star Chamber*, pt. ii, § 2.

The permanent effect of the statute seems to have been to make the Chief Justices, as Coke says, standing judges of the court, and incidentally to cause it to observe the Law Terms: ‘This Court,’ says Coke, ‘sitteth twice in the week in the Term time, viz. on Wednesdays and Fridays, except those days fall out to be the first or last days of Term, and then the Court sitteth not, but it constantly holdeth the next day after the Term ended.’

If Coke is correct, and he speaks with authority, the statute gave a power to examine on Interrogatories on oath, which did not exist before, ‘the want whereof especially in matters of frauds and deceits (being like birds closely hatched in hollow trees) was a mean that truth could not be found out.’

We may, perhaps, also suggest that the statute supplied some foundation for that list of common law misdemeanours, which, before unknown or little considered, we owe to the vigilance of the King’s Council acting as *custos morum*.

We may now glance at the procedure and decisions of the Star Chamber.

The procedure before this tribunal was three-fold. In cases between private individuals, the plaintiff filed a bill, to which the defendant put in an answer and was sworn to it. If he refused to answer he was taken to have confessed the bill, and judgement was thereupon given. Otherwise evidence was taken by interrogatories and depositions. If a question of fact could be more conveniently determined at common law, the Court directed the issue to be tried before a jury, and the verdict certified into the Star Chamber.

The second mode was *ore tenus*, but this was only possible in cases where the defendant confessed his offence. The proceedings *ore tenus* originated either in ‘soden reporte,’ or by ‘the curious eye of the State or King’s Council prying into the inconveniences and mischiefs which abound in the Commonwealth.’ The accused person was privately arrested

d examined *viva voce* by the Council. Anything he said is taken down, and he signed his answers which he had aint to confess in open court. But if his confession was 'set wn too short or otherwise than he meant he may deny it, d then they cannot proceed against him but by Bill or formation which is the fairest way¹.' If his admissions re unfortunate he was condemned *ex ore suo*, and judgement accordingly. If he declined to answer he went to prison l he thought better of it.

The third method was by a written information laid by the (b) Attorney-General, as in the King's Bench. The defendant is brought up on a writ of praemunire or subpoena. To e information he put in an answer, which was required to signed by counsel², and if such an answer was not forthcoming he was taken to have confessed the information, and dgement accordingly. After his answer was put in, he is examined on written interrogatories and the *ex officio* th was given him. To this oath the most violent objection The *ex offic* expressed. It was in the form frequently used at the oath. esent in courts of justice and known as the *voir (vrai) dire*: 'ou shall true answer make to all such questions as may demanded of you, so help you God.' It was said to be ntrary to the law of God and the law of nature, for by em *nemo tenetur prodere seipsum*. Mr. Justice Stephen

Coke, *Inst.*, iv. 5.

¹ This requirement was not merely formal, for a counsel who set his ad to anything unadvisedly would probably regret it. Mr. Baildon es a case (p. 32) where a counsel who had signed a bill imputing jury and subornation to an archdeacon and others, the charge not ng substantiated, was disbarred for seven years. Some plain language s heard now and then. Lord Keeper Egerton addressing counsel d, 'You muste goe to schoole to learne more witte, you are not ll aduyed, you forgette yo^r place, and to be plaine it is a lye.' On other occasion the Lord Keeper 'made delivery of his conceit for ieitors' (as opposed to attorneys) . . . 'that they are caterpillers del nmon weale' and maintenance would lie against them.

observes that he thinks that the real truth was that those who disliked the oath had usually done the things of which they were accused, and which they regarded as meritorious actions. Witnesses were then privately examined against him and judgement followed.

Abuse of power.

In one very important direction the Star Chamber interfered, as we should consider, most dangerously with the administration of justice. An instance will suffice.

Sir Nicholas Throckmorton was tried in the Queen's Bench for high treason in 1554. After a trial in which the prisoner was treated, as we should think, with great unfairness by the Court and the Attorney-General and defended himself with extraordinary ability, the jury acquitted him. The jury were thereupon committed to prison, eight of them being brought before the Star Chamber after six months and heavily fined. 'This rigour was fatal to Sir John Throckmorton, who was found guilty upon the same evidence on which his brother had been acquitted¹'.

What brought about the downfall of the Star Chamber, which, unless we are entirely mistaken, was not only a most valuable but a popular court, was the extraordinary severity of the sentences it passed for political offences. Death was the only punishment it dared not inflict. We may note what Mr. Dicey calls the 'savage humour' displayed in the sentence passed on the man who objected on religious grounds to eat swine's flesh. He is to be imprisoned and fed on nothing but pork. It had abandoned its true function, and had become the obedient instrument of the Government.

Turning now to some cases from the State Trials to illustrate the actual working of the Star Chamber, we find that Sir John Hollis and Sir John Wentworth were prosecuted 'for traducing the public justice²'. A man called Weston

¹ Stephen, *History of Criminal Law*, i. 326 sq.

² 2 *State Trials*, 1022.

had been hanged for poisoning Sir Thomas Overbury : Wentworth and Hollis went uninvited to the execution. Wentworth asked Weston if he really did poison Overbury, saying ‘he desired to know that he might pray with him.’ Hollis ‘wished him to discharge his conscience and satisfy the world.’ Hollis, besides, when the jury gave in their verdict had said, ‘if he were on the jury he would doubt what to do.’ Sir Francis Bacon, who was then the Attorney-General, with great grace maintained that these remarks implied that perhaps Weston’s guilt was not absolutely certain. The defendants excused themselves in a polite manner. Sir Edward Coke pronounced sentence, in which he referred to cases, beginning with the case of Abimelech, made some observations on the bad habit of going to executions, and finally by way of ‘censure’ Sir John Hollis was fined £1,000 and Wentworth 1,000 marks, and each was imprisoned a year in the Tower. This was in 1615.

In 1632 Mr. Sherfield¹ was prosecuted for breaking a glass window in St. Edmund’s church in Salisbury. He admitted that he had done so, but justified his conduct because the window ‘was not a true representation of the Creation, for it contained divers forms of little old men in blue and red coats and naked in the head, feet and hands, for the picture of God the Father, and the seventh day he hath therein represented the like image of God sitting down taking his rest, whereas the defendant conceiveth this to be false.’ Besides Eve was represented as being taken whole out of Adam’s side, whereas in fact a rib was taken and made into Eve. For these and other reasons the defendant made eleven holes in the window with his pikestaff and, said one of the witnesses, ‘the staff broke and he fell down into the seat and lay there a quarter of an hour, groaning.’ For this Mr. Sherfield was fined £500.

¹ 3 *State Trials*, 519.

Mr. Richard Chambers¹, a London merchant who had had a quarrel with some under-officers of the Customs, was summoned before the Privy Council, when he said, ‘that the merchants are in no part of the world so screwed and wrung as in England, that in Turkey they have more encouragement.’ For this he was fined £2,000 and ordered to make a written apology. He refused to do it, and was imprisoned for six years.

But what brought the court into the greatest odium was the severity of its sentences upon the Libellers. In 1632 William Prynne² was informed against for his book called *Histrio Mastix*, to which he answered that the book had been licensed, and his counsel apologized for the style of the book, ‘for the manner of his writing he is heartily sorry that his style is so bitter and his imputations so unlimited and general.’ The sentence on Prynne was that he was to be disbarred and deprived of his University degrees, to stand twice in the pillory, to have one ear cut off each time, to be fined £5,000 and to be perpetually imprisoned without books, pen, ink or paper. Five years afterwards Prynne, Bastwick and Burton were tried for libel and were all sentenced to the same punishment as Prynne had received in 1632. As Prynne, however, had lost both his ears already he was branded on the cheeks.

It should, however, be said, as Mr. Baildon has pointed out, that these enormous fines were often, if not usually, greatly reduced ‘on taxation.’ He gives a list of such reductions³, for instance a fine of £1,000 is reduced to £100, £500 to £30, and so on. And in fairness it must be admitted that cropping the ears and slitting the nose were statutory punishments for offences such as brawling in church, and provision was carefully made by statute for branding in case the offender’s ears had already gone.

¹ 3 *State Trials*, 373.

² *Ibid.*, 561.

³ *Les Reportes in Camera Stellata*, p. 411.

In addition to its criminal business, according to Mr. Baildon, the Star Chamber exercised considerable jurisdiction in cases of disputed customs of Manors, and in cases where there was a great number either of plaintiffs or defendants, also where foreigners were parties, in deceits of merchants, in causes between corporations, mayors and commonalties, bailiffs and burgesses, or great and mighty men ‘where interest drew malice and partaking.’

Civil
business
in the
Star
Chamber

Besides this, a great deal of miscellaneous business was transacted there, proclamations of Orders in Council were made, the Assay of the Mint was held, and the Lord Chancellor’s annual charge to the judges and justices of the peace delivered.

The Court was abolished by Stat. 16 Car. I, c. 10, which recites that the matters examinable in the Star Chamber are all capable of being duly remedied at common law, and that ‘the reasons and motives inducing the creation and continuance of that Court do now cease.’ Though the statute mentions, as an irregularity, that the Council does not keep a Plea Roll, it does not allege that the Court was illegal. Even Sir Edward Coke said ‘it is the most honourable court (our Parliament excepted) that is in the Christian world.’

Its
abolition.

The sinister fame of the Court of Star Chamber has thrown into shadow that of other courts of analogous character and jurisdiction. The Court of Requests, of which we find some rudimentary indications in the reign of Richard II, was a court of the Privy Council sitting to hear the complaints of poor men or the king’s household. It will be described later; at present it is enough to say that it was for a time closely connected with the Star Chamber, and that in two respects the history of the two courts present similar features. Both were defined or regulated by Henry VII,

The
Court of
Requests.

and in both the professional element became strongly represented.

The President and Council :
 (1) of Wales ;
 (2) of the North ;
 (3) of the West.

Some other courts with powers as ample and methods as summary as those of the Star Chamber assisted the Common Law. By Letters Patent, Henry VIII established the Courts of the President and Council in Wales and the President and Council of the North. The Court of the President and Council in the West was erected by Stat. 32 Hen. VIII, c. 50 with like authority. All three courts were subsidised by Parliament, so that 'his true subjects . . . have undelayed justice daily administered.' They had unlimited civil and criminal jurisdiction.

Although these courts fell with the Court of Star Chamber, they were not abolished in terms. The Court of the President and Council of the Marches of Wales was expressly abolished in 1688¹.

The President and Council of the North had co-ordinate jurisdiction with the Border Commission which was established after the union to prevent the 'thieving trade.' Commissions of oyer and terminer were directed to an equal number of Englishmen and Scotchmen extending to certain limits on each side of the Border. 'And these meet in their Sessions and hang up at another rate than the assizes, for we were told that at one session they hanged eighteen for not reading *sicut clerici*. This hath made a considerable reform²'.

Lasting effect on the Criminal Law.

The main offences punished in the Star Chamber were for the most part unknown to the common law—perjury, forgery, riot, maintenance, fraud, libel, and conspiracy. Cognizance was also taken of *attempts* to commit certain offences such as coining, murder, burglary, and poisoning, and of blackmailing and 'entangling young gentlemen in contracts of

¹ 1 Will. & Mary, c. 27.

² *Lives of the Norths*, i. 286, which see for an instance of Border justice.

marriage to their utter ruin *to which no statute extendeth.*¹ (Hudson.)

It is important to observe that the jurisdiction exercised by the Star Chamber permanently enlarged the limits of the English Criminal Law, for when the Court fell never to rise again the King's Bench without difficulty adopted the Star Chamber view.

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The extraordinary civil jurisdiction of the Council.

The rise of the Chancellor

WHILE the Council in the Star Chamber was exercising criminal jurisdiction, it was at the same time developing an extraordinary civil jurisdiction, which eventually fell into the hands of the Council's most important legal member, the Chancellor. As compared with the Justiciar the Chancellor was, at first, a humble personage. He was the chief domestic chaplain of the king and did the secretarial work, presumably because he possessed the rare gifts of being able to read and write. He apparently resided in the palace, and we know that he had a daily allowance of five shillings, a simnel, two seasoned simnels, one sextary of clear wine, one sextary of household wine, one large wax candle and forty pieces of candle¹. In the time of Henry II this allowance was made only *si extra domum comederit*, if he dined at home, *intra domum*, he only got three and sixpence with a slight variation in the other commodities². The Chancellor indeed occupied and made the most of a position strategically valuable; he was, if one may say so, secretary and managing director all in one, and being invariably in early times an ecclesiastic he was always at the king's ear, he kept the king's soul, and the king's seal³. But the jurisdiction was Council jurisdiction.

¹ Mad. Ex. 1, 195.

² Ibid., 42.

³ Seals were once rare, and not possessed by common persons. Note the gibe of Ricardus de Luci the Chief Justice, 'vir magnificus et

Those who bear in mind the various facts we have already mentioned, the constant references to the Council in novel cases, the jealousy that the Council showed of the Chancellor issuing writs other than *de cursu*, the origin of the very writ of *subpoena*, the fact that the Chancellor was a most important member of the Star Chamber, and that owing to various causes the residuary royal jurisdiction was really since Edward I vested not in the King but in the King in Council, will have little difficulty in attributing the Chancellor's rise to his connexion with the Council. The petition or bill which was addressed usually to the Chancellor complained of an alleged wrong done by some one, and asked that the offender might be sent for to answer, and that a remedy might be provided. But occasionally a petition is addressed to the Chancellor and Council; thus one about 1384¹ is 'To the Chancellor of our most redoubted Lord the King and to his most wise Council,' and another² somewhere after 1396 is addressed to the Chancellor 'and to the other most wise Lords of the Council of our most redoubted Lord the King': the explanation being that the Council sat as judges in the Court of Chancery well into the fifteenth century³. The Chancery and the Star Chamber were the two developments of the Council: 'as the Chancery had the praetorian power for equity, so the Star Chamber had the censorian power for offences under the degree of capital.' The Chancellor, as we have seen, had charge of charters, letters and public instruments, and, when seals came into use, kept the Great Seal. So to-day a man becomes Lord Chancellor by delivery of the Seal. He presided ministerially over the writ office or Chancery, and when, because the common law was inadequate in its remedies, the prudens,' when Gilbert de Balliol said that he had a seal. The great man 'subridens' said that it used not to be that 'quemlibet militulum sigillum habere quod regibus et praecipuis personis tantum competit.'

due to his
connexion
with the
Council.

His duties
originally
minis-
terial.

¹ *Select Cases in Chancery* (Selden Society), edited by W. P. Baildon, No. 107.

² *Ibid.*, No. 19.

³ *Ibid.*, xiii.

Stat. West. II¹ gave to the *officina iustitiae* the authority to issue writs *in consimili casu*, and still the common law courts did not take sufficient advantage of the statute, the Chancellor, as representing extraordinary royal justice, was soon busy. It may be said that up to the time of Edward I the royal justice was making the common law, that after that time it was correcting it.

Later
he sat
judicially,

About the end of Edward III's reign uses of land were introduced; they were discountenanced by the common law courts but were considered binding in conscience by the Chancellor. Then the judicial activity of the Chancellor may be said to have started, though as we have mentioned it is very doubtful if the Chancellor regularly sat alone in a judicial capacity before Wolsey's time. Sir Francis Palgrave thinks it quite uncertain whether till Wolsey sat alone in his own court and settled forms and practice, the earlier Chancellors did anything but issue writs. This is probably saying too much, but the composition of the tribunal was evidently uncertain, as we may gather from the cases quoted in the *Select Cases in Chancery*.

but not
neces-
sarily
alone.

Thus in 1397² the Chancellor alone dismisses a bill. Also in 1407-9³. In 1408⁴ Chancellor and Council are sitting together, and through the reigns of Henry VI and Edward IV the Chancellor is found sitting either alone, or with other members of the Council, or with the common law judges.

Various statutes delegated to the Chancellor parts of the jurisdiction claimed by the Council, e. g. to issue a *Capias* to the sheriff for the arrest of those who commit felonies and flee into an unknown place, and if that fails a writ of proclamation⁵.

The Chancery acted on the person, it had no power like the common law courts to attach property. It could issue

¹ 13 Ed. I, c. 24.

² *Select Cases in Chancery*, No. 106.

³ *Ibid.*, No. 107.

⁴ *Ibid.*, No. 95.

⁵ 2 Hen. V, s. 1, c. 9.

the subpoena, inattention to which was a contempt of the royal authority to be visited in the last instance by a commission of rebellion.

But the Chancellor's business was not confined to feoffment to uses : the jurisdiction was extended to afford relief against inequitable dealing, fraud, force, and generally in cases where the practice of the common law was inelastic. Doubtless the jurisdiction was in outline borrowed by him from the Council and strengthened by repeated acts of delegation. The following cases taken mainly from the Calendars of the Proceedings in Chancery (temp. Richard II—Elizabeth) show the variety of the complaints which came before him.

Kymberley v. Goldsmith. Bill for non-delivery to plaintiff 'to his importable losse and hindryng' of a ton of woad which defendant had sold him and which had been paid for in wool¹.

A petition from 'your poor orator William de Egremont parson of Workington' alleging that one Richard Goldsmith did horribly assault him in church, and imprisoned his servants till he paid £10 as ransom. That our Lord the King had sent writs, but only with the result of making him 'more malicious and horrible than ever,' and that he subsequently attempted to murder plaintiff on the highway and still threatens him so that he durst not abide in the country or live in his parsonage (prayer for subpoena and that the defendant find sufficient surety of the peace)².

Hodges v. Harry, temp. Henry VI. Petition to Chancery to restrain defendant by oath from using the 'sotill craftys of enchantement wychcraft and sorcerye' whereby 'he brake his legge and foul was hert³'.

Godard v. William Ridmynton, probably temp. Henry V. Bill addressed to the Master of the Rolls complaining that

The Chancellor's work.

¹ *Cal.* i. xx.

² *Select Cases in Chancery*, No. 55.

³ *Cal.* i. xxiv.

defendant had ravished his servant maid, and beseeching the Master of the Rolls to ‘tenderly consider the premissis and thereupon to set due correction¹.’

John Staverne v. John Bonynton. Petition to the Chancellor for a writ of subpoena to be directed to a witness to come and give evidence, and ‘to declare the treweth in the matiers foresaide².

A very important part of the Chancellor’s jurisdiction is said to have arisen as follows. Covenants, agreements, and declarations of trust used to be entered on the Close Rolls, and it became customary to secure their performance by a recognizance acknowledged in Chancery. The power of issuing a writ of execution belonged to the court where the recognizance was, and this court accordingly had first to determine whether there had been default or not.

The following writs were employed by the Chancellor. The *subpoena*, which was an order to attend in person and was of general application. Thus a petition to the Chancellor of our Lord the King that defendant find surety of peace (1388), obtains it.

The Sub-poena.

‘Ricardus, &c., Thome Holbein, sal. Quibusdam certis de causis nos et consilium nostrum intime moventibus tibi praecipimus firmiter iniungentes quod omnibus aliis praetermissis et excusatione quacunque penitus cessante in propria persona tua sis coram nobis *et dicto consilio nostro* die sabbati proximo futuro ubicunque tunc fuerit ad respondendum super hiis que tibi obiciuntur tunc ibidem ex parte nostra et ad faciendum ulterius et recipiendum quod Curia nostra consideraverit in hac parte. Et hoc sub poena centum librarum nullatenus omittas. Et habeas ibi tunc hoc breve. T. meipso³?’

A writ of *Quibusdam certis de causis* probably of earlier date

¹ *Cal. i. lix.*

² *Ibid., xix.*

³ *Select Cases in Chancery*, No. 7.

omitted the pecuniary penalty, and had 'sub gravi indignatione' or words similar¹. The *praemunire* writ began with the same phrase, as did the writ of *venire facias*.

Quibus-dam certis de causis.

This latter writ went to the sheriff, directing him 'venire facias coram nobis in Cancellaria nostra,' presumably if it was thought that the subpoena would not be attended to². The defendant came or was brought, and was examined, *viva voce* at first, later by written answers, but on oath.

If any one complained to the Chancellor that he was wrongfully imprisoned, the writ of *corpus cum causa* issued. Thus in 1388 we have the following answer to a petition from a man imprisoned as he says wrongfully for debt.

'Ricardus, Vicec. London, sal. Praecipimus vobis firmiter iniungentes quod omnibus aliis praetermissis et excusatione quacunque penitus cessante, habeatis coram nobis in Cancellaria nostra die lune proximo futuro ubicunque tunc fuerit Iohannem Milner de Takely in Comitatu Essex per vos in prona nostra de Neugate sub arresto detentum ut dicitur unacum causa arrestacionis et detencionis sua. Et hoc sub incumbenti periculo nullatenus omittas hoc breve vobiscum deferentes. T. meipso³.'

Corpus cum causa.

We may compare with these originals, the two most familiar writs of the present day, the Subpoena and the Habeas Corpus.

'Edward by the grace of God, &c. to . . . greeting. We command you that laying aside all excuses and pretences whatsoever you personally be and appear before . . . on the . . . of . . . there to testify the truth and give evidence. And this you are not to omit under the penalty of £100 to be levied on the goods and chattels lands and tenements of such of you as shall fail herein.' (*If 'duces tecum'* add: 'And that

Subpoena ad Testificandum.

¹ *Select Cases in Chancery*, No. 17.

² *Ibid.*, No. 18.

³ *Ibid.*, No. 8.

you or such of you in whose custody or power the same be do bring with you and produce before . . . (*our justices*) . . . aforesaid . . . (*describe documents*).

'Habeas
Corpus ad
Subiici-
endum.'

'Edward by the grace of God, &c. to . . . greeting. We command you that you have in the Queen's Bench Division of our High Court of Justice at the Royal Courts of Justice in London immediately after receipt of this Our Writ the body of *A. B.* being taken and detained under your custody as it is said together with the day and cause of his being taken and detained by whatsoever name he may be called therein, to undergo and receive all and singular such matters and things as our said Court shall then and there consider of concerning him in this behalf, and have you there then this our writ.

Witness.'

Injunc-
tions.

In the reign of Henry VI we find the origin of the equitable system of granting Injunctions. There was a case¹ in which the plaintiff had given a bond in payment of certain debts he had purchased. He then, on finding that he could not bring an action to recover the debts in his own name, filed a bill before the Lord Chancellor Waynflete to be relieved from his bond. The case being adjourned into the Exchequer Chamber, the judges held that the bond being without consideration it should be cancelled by decree, which the Chancellor accordingly pronounced. An action nevertheless was brought in the Common Pleas on the bond, and succeeded, the Court holding that the Chancellor could indeed imprison the contumacious party by way of enforcing his decrees, but that the party could still sue on his legal right in a court of law. To remedy this the Chancellor then introduced the *injunction* by which he forbade the plaintiff to proceed, or, if he had obtained judgement, to execute it. This was a fruitful source of difference between chancery

¹ Year Book, 36 Hen. VI, 13.

and common law, which remained open till the famous battle between Coke and Ellesmere.

In the Year Book 22 Edward IV, 37, we have a premonition of variance. The Chancellor granted an injunction after a verdict in the King's Bench on the ground that the verdict had been obtained by fraud. The Lord Chief Justice asked the plaintiff's counsel if they would not pray judgment, to which they said they were afraid of the injunction. The Lord Chief Justice said no harm could come to them except imprisonment, and if that happened 'apply to us for a *Habeas Corpus*, and we will discharge you.' The matter was apparently amicably arranged, and indeed at this period the relations between the Chancellor and the judges were close and friendly. He often consulted them, they often sat with him, some writs ran 'per curiam cancellariae et omnes iustitiarios' or 'per decretum cancellarii ex assensu omnium iustitiariorum.' The judges recognized the peculiar attributes of chancery, and the occasions when resort might properly be made to that court. On the other hand where a man had a remedy at common law he should not have a remedy in chancery.

The great advance that chancery made in this reign was The 'use.' with regard to 'uses.' The judges said that the *cestui que use* could maintain no action at law, for he had neither *ius in re* nor *ius in rem*.

The Chancellors, therefore, 'with general applause' declared that they would proceed by subpoena against the feoffee to compel him to perform a duty which was in conscience binding on him, and gradually extended the remedy against his heir, and against his alienee with notice of the trust, although they held, as their successors have done, that the purchaser of the legal estate for valuable consideration without notice might retain the land for his own benefit.

Cardinal Wolsey

The tenure of the Great Seal by Cardinal Wolsey was marked by great vigour. He did not, as his predecessors had done, call in the common law judges to assist him with their advice; they complained that he issued his decrees unduly: if they disregarded him he sent for them and reprimanded them. But he enjoyed a high reputation for ability and fidelity. So freely did he exercise his equitable authority, that the business in chancery grew enormously: of his own authority he established four new courts of equity in the king's name. Only one survived the fall of their great founder, and that was presided over by Cuthbert Tunstall, the Master of the Rolls. Till the Act 44 & 45 Vict. c. 68, the Master of the Rolls sat separately for hearing causes in chancery. In the 36th year of Henry VIII, 1544, Lord Southampton, then Chancellor, gave a commission to the Master of the Rolls¹ and three Masters in Chancery to hear matters in his absence, but this was only a temporary matter.

and makes new Courts.
The Master of the Rolls.

In Elizabeth's reign the common law judges rebelled against the Chancellor's interference by injunction. The Chancellor took the position that his jurisdiction did not affect to impeach the common law judgements; but admitting their validity merely relieved upon equitable considerations arising thereon. The judges retorted that though the Chancellor did not assume to examine their judgements, yet by his decrees he took away their effect.

By 57 Eliz. c. 1, it was made a *praemunire* to apply to other jurisdictions to impeach or impede the execution of judgements given in the King's Courts, and in the thirty-first year of Elizabeth a counsellor at law was indicted in the King's Bench for exhibiting a bill in chancery after judgement had gone against his client in the King's Bench².

¹ In the twentieth year of Edw. II, William de Armyn was made Master of the Rolls to relieve the Chancellor of the custody of the records.

² Crompt. 57-58.

The Court of Chancery, however, pursued its way undisturbed. It had experienced some difficulty in enforcing its decrees. The original process had been by subpoena attaching the person. The Chancellors not finding this entirely efficacious, invented (1) the *commission of rebellion* on which their officers proceeded to break open houses in execution of the decree and arrest the party as a rebel, and (2) the *commission of sequestration* to sequester the party's lands. The judges disliked this last commission extremely, and went so far as to say that if the sequestrator were resisted or killed it would be only *homicide se defendendo*.

The com-
mission of
rebellion

and se-
questra-
tion.

Coke and
Elles-
mere.

In 1616 matters came to a head in the great battle between Coke and Lord Ellesmere on the subject of injunctions. In a case in which, tried before Coke, a verdict had been obtained by a gross fraud, the Chancellor perpetually enjoined the successful party from proceeding to execute his judgement. The verdict had been gained by decoying away a necessary witness of the defendant and making the judge believe he was dying. The witness was taken to a tavern, and a bottle of sack ordered for him: as soon as he put it to his mouth the emissary went back to court, and when the witness was called the emissary swore that 'he had just left the witness in such a state that if he were to continue in it a quarter of a hour longer he would be a dead man.' The Chancellor on learning this granted an injunction.

Indictments were then preferred against everybody, suitors, solicitors and counsel for a *praemunire* for questioning in equity a judgement obtained in the King's Bench.

The King, after taking advice with the great law officers, supported the Chancellor not merely on the grounds that they gave him, but added something about it being part of his 'princely office' and suitable for his 'princely wisdom' to determine disputes between his several courts.

From that time down to the Judicature Acts the power

of the Court of Chancery to issue injunctions was never disputed¹.

The strength of the jurisdiction of the Court of Chancery lay in the writ of subpoena commanding the defendant to appear, and the subsequent process against the person if its decree was disregarded. Without too roughly wounding the susceptibilities of the common law judges by acting directly against them, it obtained a virtual control over their courts by ordering a suitor on the application of the person interested to refrain or desist from enforcing his legal rights on pain of imprisonment. By this means it obtained a practically exclusive jurisdiction over such matters as mortgages and trusts in which it took a different view of the rights of parties from the courts of common law. It also obtained a jurisdiction over the restraining of wrongs, the winding up of partnerships and the taking of accounts which the courts of common law neglected to assume, and forced the defendant to make answer on oath to written interrogatories, a convenient mode of eliciting the truth, which was in strong contrast to the practice of the common law by which the parties to an action were not competent witnesses. Such indeed was the slowness and want of elasticity of the common law that had it not been for the genius of Lord Mansfield the mercantile law of this country would have found its way into equity.

Though at one time the Chancellor's equity was open to the reproach of Selden that it varied with the length of the Chancellor's foot, it gradually became systematized; rules grew up because precedents were followed. Several Chancellors, such as Lord Nottingham and Lord Eldon, have gained fame on the ground that they powerfully contributed to this result, but justice cannot be done to them here.

¹ See *Hoare v. Bremridge*, L. R., 14 Eq. 522.

By 53 Geo. III, c. 24, the Crown was authorized to appoint
a Vice-Chancellor to help the Lord Chancellor.

The Vice-Chancellors.

By 5 Vict. c. 5 two more Vice-Chancellors were appointed,
on the occasion when the equitable jurisdiction of the Court
of Exchequer was taken away.

In 1851 were created two Lord Justices of Appeal in
Chancery, who together with the Lord Chancellor should
form the Court of Appeal in Chancery¹.

The Lords Justices of Appeal in Chancery.

From that court appeal lay to the House of Lords².

¹ 14 & 15 Vict. c. 83.

² Ibid., § 10.

CHAPTER XVI

THE COURT OF REQUESTS

Its origin. THE origin of this court is attributed by Palgrave and Spence to the order of 13 Ric. II regulating the procedure of the Council¹, which said that the Lord Privy Seal together with such of the Council as were then present should expedite (*exploiter*) the bills of the lesser folk, and hence Palgrave deduces the claim of Lord Privy Seal to preside in the Court of Requests. There seems, however, no authority for saying that the Court of Requests dated from that period. The learned editor of the *Select Cases in the Court of Requests*², states that he first finds the name 'Court of Requests' in 1529, and in the sentence which he quotes, 'Hereafter folowe the names of such Counsaillours as be appoynted for the heryng of power mennes causes in the Kynges Courte of Requestes,' he points out that stress is laid on the fact that the judges are Councillors.

Its connexion with the Council.

The order of Richard II made a Committee of Council, and the true view would appear to be that for a long time the court was either a delegation or an aspect of the Council, similar in character to the early position of the Court of Chancery and the Star Chamber, and deriving its authority from that fact.

Henry VII made it a definite tribunal, and nominated the

¹ *Vide supra*, p. 120.

² Edited for the Selden Society by I. S. Leadam, xiv.

members, thus turning into a permanent or standing committee what had before been a haphazard meeting of councillors. But even then, its intimate connexion with the Council and the Star Chamber is attested by the list of Sir Julius Caesar¹, which shows that all the judges in the Star Chamber from the ninth year of Henry VII down to the third and fourth of Philip and Mary sat *alternis vicibus* in the King's Court at Whitehall commonly called the Court of Requests, or wherever the king held his council, for the hearing of private causes between party and party. The Lord Privy Seal had also a seat in the Star Chamber.

Wolsey placed the Court of Requests permanently in Whitehall, for the expedition of poor men's causes (1515-9). Till then, this 'Court,' as it was called, 'of Poor Men's Causes,' attended the royal person on the royal progresses, and it is not till about 1497 that its books indicate that any difference is made between term and vacation. Mr. Leadam pertinently remarks that this discrimination, when it was made, indicates that a professional element was getting control of the court. Suppliants to the court alleged usually, either that they were too poor to sue at common law or that they were king's servants attending the royal person. When the professional element first appeared in the court it is hard to say, but at the end of the reign of Henry VIII 'the court was composed of professional lawyers, civilians and canonists, and the judges were styled Masters of Requests²'.

The Poor
Men's
Court.

Its com-
position.

Since the accession of Henry VII the court had never been idle; in especial, it had taken the part of copyholders who were suffering under the enclosures of their lords. When the dissolution of the monasteries had given estates to needy courtiers, and rising prices made land more valuable, the tenantry were forced to invoke assistance in increasing

¹ *Select Cases in Court of Requests*, evi, cviii.

² *Ibid.*, xvi.

numbers, and the legal element in the court became more prominent. Two permanent judges, 'Masters of Requests Ordinary,' 'began towards the end of Henry VIII's reign to control the work of the court¹.' Elizabeth, being much in love with royal progresses, required the old machinery to deal with such petitions of justice and grace as were presented to her *en route*. Two Masters of Requests Extraordinary were then appointed to reinforce the court, and this set free two to accompany her.

After the accession of James I, four Masters in Ordinary were appointed, but as the volume of business became very heavy, and as the king still went on progresses, there were great complaints of the irregularity of the sittings and the delays which naturally resulted.

Its functions.

The functions that the court during this period discharged were analogous to those of the Council, at any rate prior to the reign of Henry VII. There is this difference, that the Court of Requests entertained only civil business, but both are alike in this, that they offered relief to those who either from disadvantages personal to themselves or from the rigidity of the common law were unable to get justice. Here was the poor man's court of equity, and it is beyond question that it attracted an abundant amount of business.

Hostility
of the
Common
Law
Courts.

Its jurisdiction was, however, to be seriously attacked. So long as it was uncontestedly a committee of the Council, its position was as impregnable as that of the Star Chamber. But when the councillors disappeared from the board and the purely professional element remained, it was vigorously asserted by the common law courts that here was, in effect, a new commission which the crown could not grant, and that if a suitor desired equity there was the Court of Chancery open to him.

It was doubtless the truth that however theoretically

¹ *Select Cases in Court of Requests*, xix.

perfect the legal succession, practically this court could not, as now constituted, claim the support of immemorial custom. The Privy Council, that is the active members of the Council, had become a distinct body: Privy Councillors sat in the Star Chamber, they did not sit in the Court of Requests; the Star Chamber had in addition some statutory authority, the Court of Requests had none.

On January 16, 1597, Sir Julius Caesar, one of the Masters of Requests Ordinary, writing to Lord Burghley, enclosed a memorandum in defence of the Court of Requests, maintaining that it was 'member and parcell of the King's most honourable Counsell attendant on his person,' and giving one or two instances in which the common law courts had recognized the court, one case particularly in which by letter the Common Pleas requested the intervention of the Court of Requests 'being a court of equity' to stay their own common law process. This happened in 1585, but within a few years the attitude of the common lawyers had entirely changed. It is not very profitable to discuss motives, but it is certain that the extensive operations of the Court of Requests, due possibly to greater cheapness and less technicality, materially diminished the quantity of business which came to the common law courts, and thus diminished the fees payable therein. Prestige and profits were alike affected. The Requests entertained suits which, the defendants constantly said, were determinable at the common law, it issued injunctions staying suits at common law, and forbidding defendants to sue the plaintiff pending the suit in the Requests or after judgement, and took bonds of the parties to perform its decrees. It is also possible that this dislike was strengthened by the growing jealousy of the Prerogative.

At any rate in 1590, according to the authorities, the attack commenced. The Common Pleas, speedily reinforced by the Queen's Bench, commenced to issue prohibitions to

Sir Julius
Caesar's
defence.

plaintiffs in the Requests, issued writs of habeas corpus in favour of persons imprisoned by the Requests for contempt, and in *Stepney's case* (40 & 41 Eliz. 1598) it was adjudged, according to Coke¹, that the Requests was no court that had power of judicature, but that all proceedings there were *coram non iudice*, and that an arrest under a warrant of Privy Seal was false imprisonment.

When we remember Sir Edward Coke's furious indignation against the injunctions of the Court of Chancery, it is not surprising that he threw the weight of his authority against the Requests. The year after he became Chief Justice of the Common Pleas all the judges agreed that a perjury in the Court of Requests was not punishable, 'for it is but a vain and idle oath and not a corrupt oath because the Court of Requests have nothing to do with nor can examine titles of land.' *Quod nota*, adds the reporter².

Its disappearance.

It has been generally accepted on the authority of Spence and Palgrave that the Requests never survived the blow they received in the forty-first year of Elizabeth. Now that Mr. Leadam's book is published it is impossible to hold that view. Blackstone³ said that the court was 'virtually abolished' by 16 Car. I, c. 10 (1640), commonly known as the Act aimed against the Star Chamber and the courts of cognate derivation. 'Virtually,' for the court is not mentioned in the Act, and as a fact continued without apparently any challenge. Between April 28 and May 17, 1642, Mr. Leadam has counted in its books of orders and decrees 556 orders made! In August of that year the Civil War broke out, the Privy Seal was withdrawn, the legal machinery lost, and the court died a natural death.

¹ *Inst.*, iv. 9, fo. 97.

² Yelverton, 3rd ed., 111.

³ *Comm.*, iii. 51.

CHAPTER XVII

THE COURT OF ADMIRALTY

THE history of the jurisdiction of this court is, says Its origin. Bishop Stubbs, 'as yet obscure.' Prynne¹ asserts that there was an Admiralty Court with civil and criminal jurisdiction temp. Henry I which dated from Saxon times, but his authority is the Black Book of the Admiralty, which is now supposed by the best authorities² to have been written in the fifteenth century and of which the matter is not earlier than the fourteenth century, the references to the times of Henry I and John being considered apocryphal.

The title of Admiral does not occur much before the The office of Admiral. fourteenth century, and then in connexion with the French possessions of the English Crown. In the Vascon Roll 23 Ed. I, we find mention of the appointment of an Admiral of 'the Baion fleet'; in 1300, Gervase Alard was made Admiral of the fleet of the Cinque Ports, and this is the earliest known use of the title in England³. The word itself was employed in the Mediterranean navies, and is believed to have come from the east by way of Genoa.

The Admiralty courts appear somewhere between 1340 Admiralty Courts.

¹ *Animadversions*, 106.

² *Select Pleas in the Court of Admiralty* (Selden Society), Introd.

³ Holtzendorff, *Handbuch des Völkerrechts*, 346 and 350, says that William de Leybourne has the title 'Admiral de la mer du Roy d'Angleterre' in 1286. See *Dict. Nat. Biog.*, s. v., W. de Leybourne. As to prize jurisdiction see Holtzendorff, 351, 6 (vol. i. § 76), n. 3, 6.

and 1357, in consequence, it is said, of the difficulties experienced by us in dealing with piracy or 'spoil' claims by or against foreign sovereigns. Before 1340 there was a constant correspondence between ourselves and foreign kings on this topic and on the alleged inability of injured persons to obtain justice. Our courts of common law when the plaintiff was a foreigner seem to have given no redress.

The matter was brought prominently before the notice of Edward III when he had to pay out of his own pocket damages for outrages committed on his allies the Genoese by his own subjects. In 1340 the battle of Sluys which gave him maritime supremacy, and allowed him to assert his claim to be sovereign of the sea, offered him the opportunity of founding an Admiralty Court to keep the king's peace thereon.

Con-
nex-
ion of
the
Council
with ad-
miralty
affairs.

Down to the early part of Edward III's reign, admiralty matters came either before the common law courts, the Chancellor, or the Council (there is one case before the Council in 1352); piracy, reprisals, and letters of marque were considered specially within the purview of the Chancellor and to be 'the most noble and eminent piece of his jurisdiction.' (Hale.)

At the same time there were several maritime towns, e.g. Ipswich and Padstow, which had from a very early period 'Courts of the Seaport,' which administered the law maritime. Between these courts and the Admiral's Court, there arose disputes as to jurisdiction, and in consequence two statutes¹ were passed defining and restricting the jurisdiction of the Admiral, while at the same time the crown granted charters of exemption to various towns from the Admiral's authority, and in some cases, such as Yarmouth, Dartmouth, and Rochester, express grants of admiralty jurisdiction were made to the town.

We are able from the records published by the Selden

¹ 13 Ric. II, st. 1, c. 5 and 15 Ric. II, st. 2, c. 3.

Society to see what the Admiralty courts were doing before the statute of Richard II was passed in 1389.

In 1353 a case as to ownership of goods recaptured from pirates was tried before the Admiral and Council.

In 1357 there is an answer to the King of Portugal about some Portuguese goods which had been taken by the English from a French ship which had 'spoiled' a Portuguese vessel. Edward III says that the admiral had decided that the goods were good prize.

In 1360 John Pavely is made captain of the fleet *with power to hold pleas* (querelae). This is the first instance of such a commission. In the same year Beauchamp is given the command of the fleets of the north, south, and west, with grants of maritime jurisdiction.

In 1361 a commission to Sir R. Herle to try a case of piracy and murder *according to the common law*, was recalled on the advice of the Council, on the ground that by common law felonies, trespasses, and injuries done on the seas, should be tried by the admiral by the law maritime.

The theory of the common lawyers was that all matters arising outside the jurisdiction of the common law, i.e. outside the body of a county, were inside the jurisdiction of the Admiralty¹. Crimes committed at sea were till Statute 28 Hen. VIII, c. 15, indisputably within its jurisdictional competence. 'That this court had originally cognizance of all transactions civil and criminal, upon the high seas in which its own subjects were concerned is no subject of controversy' (per Lord Stowell in *The Hercules*²). And in fact, criminal cases even of the degree of capital were habitually tried in the Admiralty, sometimes without a jury, down to the time of Henry's statute. Piracy, we may notice, was seemingly not a common law felony, for

¹ 4 Inst. 134-5.

² 2 Dod. 371.

in 1429 Parliament petitions that it may be made so, and gets for an answer, *Le Roi s'avisera.*

In 1364 there occurs a *supersedeas* to justices, to stay proceedings on an indictment for a nuisance by driving piles into the beds of certain creeks near Colchester, *because it had been dealt with in the Admiral's Court.*

In 1369 an action on a charter party is tried before the Admiral, and an action on the same matter in the sheriff's court of London is stayed on production of the certificate.

The two statutes of Richard II (13 Ric. II, st. 1, c. 5, and 15 Ric. II, st. 2, c. 3) may be conveniently read together.

Statutory
limita-
tions in
the in-
terest of
the Com-
mon Law
Courts.

The first recites the complaints against the Admirals and their deputies for holding sessions in divers places within and without franchises, impoverishing the common people &c., and the second provides that the Admiral's Court is to take no cognizance of contracts, pleas, and quarrels, and all other things arising within the bodies of the counties: but it may take cognizance of the death of a man and of mayhem in great ships hovering in the main stream of great rivers, but only beneath the bridges of the same rivers nigh to the sea, and in no other places.

The precedents in the Black Book of the Admiralty show that the business of the court during the fourteenth and fifteenth centuries consisted of criminal, mercantile, and shipping cases.

The first patent for a judge of the Court.

In 1482 we have the first patent appointing a judge of the Admiralty Court, to hear cases 'de iis quae ad curiam principalem Admirallitatis nostrae pertinent'.¹

In 1509–19 Henry on his accession made treaties with France providing for special tribunals to try piracy claims with dispatch. In England, the Earl of Surrey the Lord High Admiral, Cuthbert Tunstall, M. R., and Christopher

¹ Pat. 22 Ed. IV, pt. 1, m. 2.

Middleton, judge of the Admiralty, were appointed judges. Judgement was to be given on the merits ‘*sine strepitu et figura indicii sola facti veritate inspecta.*’ No appeal was allowed, except to the Council on bail.

Till that reign the Court of Admiralty exercised both civil and criminal jurisdiction in virtue of the royal prerogative. It was nearly connected with the Council, and it was independent of the common law.

As in that reign its powers were much curtailed, it is probably convenient to deal first with the history of its *Criminal jurisdiction.*

The Statute 28 Hen. VIII, c. 15, recites that people committing offences on the sea often escape punishment, because it is hard to get witnesses, if the prisoners will not confess, which they will not do without torture. Accordingly all treasons, felonies, robberies, murders, and confederacies committed within the admiralty jurisdiction shall be judged according to the Common Law, before the Admiral or his deputy, and three or four other substantial persons appointed by the king.

As a fact these ‘substantial persons’ were always common law judges, who thus gained the control of this mixed commission.

Then came some very intricate legislation, which produced the result that all crimes committed at sea can be tried before any court in England if otherwise competent, or before any Supreme Court in a colony, or any High Court in India.

By the Central Criminal Court Act¹ that court was empowered to try all offences committed within the admiralty jurisdiction.

By 7 & 8 Vict. c. 2 (1844), all commissioners of Oyer and Terminer or Gaol Delivery have all the powers which the

Henry VIII's
settle-
ment :
victory
of the
Common
Lawyers.

Recent
legisla-
tion.

¹ 3 & 4 Will. IV, c. 36.

commissioners under the act of Henry VIII would have had. The Consolidation Act of 1861 is to the same effect.

Besides these statutes, the Merchant Shipping Acts makes similar provision for the punishment of crimes committed at sea.

Admiralty jurisdiction begins below low watermark, such being not within the body of any county, and when the tide is in, below high watermark.

The three
mile limit.

In the case of *The Queen v. Keyn*¹, the majority of the judges held that the Admiral's jurisdiction does not extend over a crime committed *by a foreigner on board a foreign ship* within three miles of the coast. This was amended by the Territorial Waters Jurisdiction Act, 1878, but it was provided that proceedings in such a case shall not be instituted without the consent and certificate of a Secretary of State.

Civil
juris-
diction.

With regard to the *civil jurisdiction* of the admiralty, the common law courts never attempted to prohibit the Court of Admiralty in relation to *wrongs* committed on the high seas. But the jurisdiction with regard to contracts was bitterly contested.

By Statute 32 Hen. VIII, c. 14, the admiralty got jurisdiction to try cases on contracts made abroad, bills of exchange, charter parties, insurance, average, freight, non-delivery of cargo, damage to cargo, negligent navigation, and breach of warranty of seaworthiness.

By his letters patent the king conferred wide jurisdiction, 'statutis in contrarium non obstantibus,' previous patents having always been limited agreeably to the statutes of Richard II. The letters patent of 1547 include 'any thing, matter, or cause whatsoever, done or to be done as well upon the sea as upon sweet waters and rivers from the first bridges

¹ L. R., 2 Ex. D. 63.

to the sea throughout our realms of England or Ireland or the dominions of the same.'

On the death of the Earl of Lincoln, the Lord High Admiral in 1585, the question arose whether the judge of the Admiralty Court could sit and decide cases during the vacancy. The Queen was advised that he could, and that the judge was appointed by the king's letters patent, so that he was judge of the Admiralty, 'be there an admiral or no admiral.' The Queen, nevertheless, *ex abundanti cautela*, issued a special commission.

About 1570 we find the Admiralty complaining that the common law courts are encroaching¹. The Queen then wrote to the mayor and sheriffs of London that this is 'very strange,' and tells them not to do so. But the complaints still go on, and, in 1575, a special commission issues to the Admiralty, empowering it to hear cases on charter parties, bills of lading, bills of exchange, insurance, freight, bottomry, necessaries for ships, and contracts binding ships, others being prohibited from taking cognizance of such pleas.

Shortly after this, it is said that the Admiralty Court and the common law judges came to an agreement as to the limits of their jurisdictions as follows :—

- (1) After sentence pronounced by the Court of Admiralty, no prohibition to be granted at common law unless applied for within next term.
- (2) The judge of the Court of Admiralty to be allowed to appear and show cause against the prohibition.
- (3) The judge of the Court of Admiralty is by custom, time out of memory, to have cognizance of all contracts and other things arising beyond and upon the sea without let or prohibition.

¹ For an instance of the Q. B. being rebuked for prohibiting the Admiralty, see Dasent, xv. N. S. 314 (1587).

Jealousy
of the
Common
Law
Courts.

A 'con-
cordat.'

(4) The Court of Admiralty to have cognizance of breaches of charter parties over sea voyages according to 32 Hen. VIII, c. 14, though such were made within the realm.

In 1632, the judges were summoned to the Privy Council to advise on the same matter, and they signed a paper much to the same effect.

The Common Law and Admiralty jurisdictions mutually exclusive.

But the rivalry continued. The common law gave no remedy in cases of contracts made or torts committed abroad. The admiralty jurisdiction was taken to supply this deficiency, but not to apply within the body of a county. The common law watched the proceedings of the Admiralty with great attention and issued prohibitions without mercy. The Admiralty vainly asserted its jurisdiction over claims for necessaries and materials supplied to ships or over charter parties. Unless the contract was actually made, or the goods actually supplied on the high sea, the prohibition went, for the Admiralty was not a court of record.

The fiction of the Common Lawyers.

Blackstone¹ writes, ‘it is no uncommon thing for a plaintiff to feign that a contract really made at sea was made at the Royal Exchange or other inland place, in order to draw the cognizance of the suit from the Court of Admiralty to those of Westminster Hall.’

The admiralty jurisdiction over contract thus gradually fell into disuse, and the same fate befell it in respect of torts of a ‘transitory’ description.

Legislation.

In consequence of the great inconvenience caused to parties by this state of affairs, in 1840 the first Admiralty Court Acts were passed², which increased the jurisdiction of the court, and gave it power to enforce its decrees. In 1854, the Merchant Shipping Act, and the Second Admiralty Court Act³, increased its procedural efficiency, and its powers with respect to cases of wages and salvage.

¹ *Comm.*, iii. 106.

² 3 & 4 Vict. cc. 65 and 66.

³ 17 & 18 Vict. cc. 78, 104.

In 1861, the third Admiralty Court Act¹ gave it almost all the jurisdiction it asked except in cases of charter parties, viz. over claims for building, equipping, and repairing ships, claims for necessaries supplied to ships, claims for damages to cargo imported, claims for damages done by ships, questions touching ownership, claims for wages and disbursements by masters, and in respect of registered mortgages.

The jurisdiction conferred by the Act might be exercised either by proceedings *in rem* or *in personam*.

After the third Admiralty Court Act was passed, the advantages of speedy administration of justice were so obvious that the jurisdiction was delegated in the smaller cases to the county courts around the coast, by the County Courts Admiralty Jurisdiction Act, 1868, the operation of which was extended by another statute passed the next year. The old local maritime courts had been abolished by the Municipal Corporation Act, 1835², the Cinque Ports Admiralty Court alone surviving.

Old maritime Courts abolished.

Appeals from the Admiral went in the fifteenth century to delegates appointed by the crown, or special commissioners *ad hoc*. In 1534³ commissioners called Delegates of Appeals were appointed to hear appeals from the ecclesiastical and admiralty courts. Their powers were by 2 & 3 Will. IV, c. 92, transferred to the King in Council, and by 3 & 4 Will. IV, c. 41, the Judicial Committee of the Privy Council was formed to take all appeals which may be brought before the King in Council.

Admiralty appeals.

By the Judicature Act of 1873, the Court of Admiralty⁴ was merged in the High Court of Justice, and so indirectly

Merger in the High Court of Justice.

¹ 24 & 25 Vict. c. 10.

² 5 & 6 Will. IV, c. 76.

³ 25 Hen. VIII, c. 19.

⁴ By 20 & 21 Vict. c. 85, it was provided that the judge of the newly-established Court of Probate might also be the judge of the Admiralty Court at the next vacancy.

obtained jurisdiction over all maritime causes, though limited as to its jurisdiction *in rem* to those causes as to which its jurisdiction was either original or given by statute. Appeals lie to the Court of Appeal and thence to the House of Lords.

The Vice-Admiralty Courts in the Colonies.

The
Colonial
Vice-Ad-
miralty
Courts.

These were established as a means of giving effect to the existing jurisdiction of the Admiral's Court.

In 1832, in view of doubts felt as to the jurisdictional competence of these courts in causes of action arising outside the limits of such colonial possession, the statute 2 & 3 Will. IV, c. 51 was passed declaring this jurisdiction to exist in those cases usually tried in the Admiralty Court, viz. collision, salvage, pilotage, bottomry, respondentia, &c.

From these courts, appeal lay to the Privy Council.

By the Vice-Admiralty Courts Act, 1863¹, it was enacted that the governor of a colony should be *ex officio* vice-admiral, and that the chief justice of a colony should be *ex officio* the judge of the court. The matters over which the court was to have jurisdiction were set out in sec. 10, whether or no the cause of action arose within or outside the limits of the colonial possession. Appeal lay to the Privy Council within six months.

In 1890 the Colonial Courts of Admiralty Act² was passed. By it every court of law in a British possession, having in the said possession original unlimited civil jurisdiction, shall be a court of admiralty, and can employ in its admiralty jurisdiction all the power it possesses for its other civil jurisdiction. Its jurisdiction shall be the same as the admiralty jurisdiction of the High Court in England and it shall exercise it in like manner.

Appeal lies to the local Appellate Court and thence to the Privy Council.

¹ 26 Vict. c. 24.

² 53 & 54 Vict. c. 27.

CHAPTER XVIII

THE JUDICATURE ACTS

By the Judicature Act of 1873¹ which, after being deferred for a year, came into operation on November 1, 1875, the whole judicial system of this country was remodelled.

At the time that the Act was passed the Common Law, as we have seen, was administered in the courts of Queen's Bench, Common Pleas, and Exchequer, each with a staff of a Chief and his puisnes. From these courts lay appeal to the Court of Exchequer Chamber (Cam. Scacc.), and thence to the House of Lords.

The equitable jurisdiction of the Court of Chancery was exercised by the Lord Chancellor, the Master of the Rolls, and three Vice-Chancellors sitting as judges of first instance. The Lords Justices sat with the Lord Chancellor as a Court of Appeal, and from them appeal lay to the House of Lords.

Testamentary and matrimonial business was originally taken by the Prerogative Courts of Canterbury and York: in 1857 the Court of Probate and the Court for Divorce and Matrimonial Causes were established and took over this jurisdiction. From the Court of Probate appeal lay to the House of Lords². It was provided that the Judge of the Court might also be the Judge of the Admiralty Court at the next vacancy. The Court for Divorce and Matrimonial

¹ 36 & 37 Vict. c. 66.

² 20 & 21 Vict. c. 77, § 39.

Causes was formed of the Lord Chancellor, the three Chiefs, and the Senior Puisne Judge in each Common Law Court, and the Judge of the Court of Probate, this latter being the 'Judge Ordinary.' From the Judge Ordinary appeal lay to the full Court, and from that in petitions for the dissolution of Marriage to the House of Lords.

Under the Act creating it¹, the Court acquired the additional power of decreeing dissolution of marriage, which till then could only be effected by Act of Parliament.

By the Act of 1873 all these Courts were united and consolidated together and constituted one Supreme Court of Judicature in England (§ 3).

The Supreme Court :

This Supreme Court consists of two permanent divisions, His Majesty's High Court of Justice, and His Majesty's Court of Appeal (§ 4).

(1) The High Court of Justice.

The High Court of Justice was to be constituted of the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, the Vice-Chancellors, the Judge of the Court of Probate and of the Court for Divorce and Matrimonial Causes, the Puisnes of the three Common Law Courts, and the Judge of the High Court of Admiralty.

All these judges to have (except as otherwise provided) equal power, authority, and jurisdiction. In the absence of the Lord Chancellor the Lord Chief Justice of England to be President (§ 5).

(2) The Court of Appeal.

The Court of Appeal was to be constituted of five *ex officio* judges, viz. the Lord Chancellor, the Master of the Rolls and the three Chiefs, of ordinary judges not more than nine in number (who were to be the Lords Justices of Appeal in Chancery), the existing salaried judges of the Judicial

¹ 20 & 21 Vict. c. 85.

Committee of the Privy Council appointed under the Act of 1871 (four in number), and such three other persons as Her Majesty might be pleased to appoint by letters patent. The Lord Chancellor to be President (§ 6).

The jurisdiction of the High Court of Justice was to include all the jurisdiction of all the courts thus consolidated, together with the jurisdiction of the Court of Common Pleas at Lancaster, the Court of Pleas at Durham, Commissioners of Assize, Oyer and Terminer, and Gaol Delivery, subject to certain specified exceptions.

The new Court of Appeal was to have the powers and jurisdiction of the Lord Chancellor and the Lords Justices in equity, of the Exchequer Chamber in common law, and of the Privy Council in admiralty appeals.

This Act provided for the extinction of the appellate jurisdiction of the House of Lords and Privy Council, but as this policy was reversed by the Appellate Jurisdiction Act of 1876 (*vide infra*) it needs no more than a passing observation.

Law and equity are to be concurrently administered in every court by every judge. Claims, defences, and relief, equitable estates, titles, rights, and all equitable duties and liabilities appearing incidentally, are to be recognized in the same manner as the Court of Chancery would have recognized them prior to the passing of the Act.

Any barrister of not less than ten years' standing is qualified to be appointed a judge of the High Court (§ 9).

The judges hold office for life subject to a power of removal by the Sovereign on an address presented to him by both Houses of Parliament. No judge can sit in the House of Commons (§ 9).

By § 31 the High Court of Justice was divided into five The divisions

- of the High Court : Ch. D.
- Q. B. D.** The Chancery Division consisting of the Lord Chancellor, the Master of the Rolls, and the Vice-Chancellors.
- C. P. D.** The Queen's Bench Division consisting of the Lord Chief Justice, and the puisnes of the Queen's Bench.
- C. P. D.** The Common Pleas Division consisting of the Lord Chief Justice, and the puisnes of the Common Pleas.
- Ex. D.** The Exchequer Division consisting of the Lord Chief Baron, and the barons of the Exchequer.
- P., D. and A. D.** The Probate, Divorce, and Admiralty Division consisting of the existing judges of the Probate Court and Admiralty.

By § 32 the Crown was authorized by Order in Council to alter these divisions and abolish on a vacancy any of the following offices, viz. of Lord Chief Justice of England, Master of the Rolls, Lord Chief Justice of the Common Pleas, and Lord Chief Baron of the Exchequer.

Consolidation of the Common Law Divisions. (By Order in Council, December 16, 1880, the offices of Chief Justice of the Common Pleas and Chief Baron were accordingly abolished, and the Divisions of Queen's Bench, Common Pleas, and Exchequer were consolidated.)

By § 34 certain business is assigned (subject to modification by Rules of Court) to particular Divisions. Thus to the Chancery Division are assigned *inter alia* causes and matters for the following purposes—administration of the estates of deceased persons, dissolution of partnerships and taking accounts, redemption and foreclosure of mortgages, the execution of trusts, the rectification and setting aside of deeds or other written instruments, specific performance connected with sales of realty, wardship, and care of infants' estates.

Jurisdiction in matters of *law* arising in criminal trials is to be exercised by the judges of the High Court of Justice or five of them at least of whom one chief shall be part (§ 47).

C. C. R. (This tribunal is known as the Court for Crown Cases

Reserved (C. C. R.) and was originally constituted by 11 & 12 Vict. c. 78.)

The jurisdiction of a judge on Circuit who carries His The Judge on Circuit. Majesty's Commission is not limited by the terms of his commission ; he is deemed to constitute a Court of the said High Court of Justice (§ 29).

(Before the Act, it is said, a mandamus could issue to him if he refused to perform an obligatory duty¹.)

The Act after directing that in certain specified cases, as for instance, of assignment of choses in action, equitable waste, merger, and stipulations not of the essence of the contract, the old rule of the common law was to be altered for the rule of equity, lays down the general principle that wherever there is any conflict or variance between the rules of equity and those of the common law with reference to the same matter, the rules of equity shall prevail.

The Act not only affected principle but practice. Remedies once peculiar to some particular court can now be given in any Division. Thus, that practice and procedure of which the benefit could once only be got by the plaintiff bringing a bill in chancery, is made available by interlocutory applications in all the Divisions of the High Court. The courts of common law, for instance, could give no relief against threatened injury. The courts of equity both could and did. Now, all courts can issue Injunctions. So with the remedy of Specific Performance. On the other hand till Lord Cairns' Act the courts of chancery were unable to give damages.

Till Bentham's time the common law excluded principals from giving evidence in a civil action. They were not made competent witnesses till 1851². Chancery was never fettered in this way, and on the assumption that the parties to an

¹ *Regina v. Harland*, 8 A. & E. 826.

² 14 & 15 Vict. c. 99.

action possibly knew as much about the matter as other people, granted interrogatories and orders for production of documents, interrogatories being written questions put by plaintiff to defendant, or *vice versa*, to be answered on oath.

It does not, however, seem that by this Act the High Court can exercise powers not previously exercised by any court¹.

Thus was brought about what has been called the ‘fusion of law and equity.’ Some would say that ‘supersession’ would be a more accurate description of the process. But whatever the name, the development has progressed by stages which are normal and perfectly familiar to every student of Jurisprudence, viz. Law, Equity, and Legislation.

The Act
of 1875.

The Court
of Appeal.

By the amending Act of 1875² it was provided that the Lord Chancellor was *not* to be deemed a permanent judge of the High Court, and that the Court of Appeal was to be constituted of five *ex officio* members and not more than three ordinary members (§§ 3, 4).

The Act
of 1876.
The House
of Lords.

By the Appellate Jurisdiction Act, 1876³ appeal lies to the House of Lords from the Court of Appeal in England, and from those Scotch and Irish courts from which an appeal lay before the commencement of this Act by common law or statute.

There must be present at such an appeal not fewer than three of the following persons, designated as Lords of Appeal :

- (1) The Lord Chancellor of Great Britain.
- (2) The Lords of Appeal in Ordinary.
- (3) Such Peers of Parliament as are holding or have held ‘high judicial office’ as defined in the Act⁴.

¹ *North London Railway Company v. Great Northern Railway Company*, 11 Q. B. D. 30.

² 38 & 39 Vict. c. 77.

³ 39 & 40 Vict. c. 59.

⁴ See p. 128.

Two such Lords of Appeal in Ordinary may be appointed by His Majesty; to be eligible the person must have been for two years holding a 'high judicial office' or a practising barrister for not less than fifteen years. Such a Lord of Appeal is entitled to the style of Baron, and can sit and vote during his life.

(This provision comes from the amending statute, 50 & 51 Vict. c. 70.)

The Lords of Appeal, if Privy Councillors, are members of the Judicial Committee of the Privy Council, and it is their duty to sit and act as such, without prejudice however to their duties in the House of Lords (§ 6).

The hearing and determination of appeals may be proceeded with during prorogation, and even during dissolution if authorized by His Majesty by writing under the Sign Manual.

Whereas under the powers conferred by 34 & 35 Vict. c. 91 Her Majesty appointed four paid members of the Judicial Committee of the Privy Council, it was now provided that when any two of these should die or resign Her Majesty might appoint a third Lord of Appeal, and on the other two dying or resigning, a fourth.

There are now four Lords of Appeal in Ordinary, the above condition having been fulfilled.

His Majesty may appoint three additional ordinary judges of the Court of Appeal (§ 15).

By the Stat. 44 & 45 Vict. c. 68 (1881), the Master of the Rolls (who since the time of Cardinal Wolsey had sat as a judge of first instance) is to be a judge of appeal only, thus ceasing to be a judge of the High Court of Justice, and the ordinary judges are to be five in number (§ 3).

(There was at the time a vacancy in the Court of Appeal which was filled by the Master of the Rolls. The Court now

The Act
of 1881.
The
Master of
the Rolls
and the
Court of
Appeal.

consists of the Master of the Rolls and five Lord Justices, not counting its *ex officio* members.)

By § 4 the President of the Probate Division and Admiralty Division shall be an *ex officio* judge of the Court of Appeal.

By § 15 the Lord Chief Justice must form part of the Court for Crown Cases Reserved unless he or his medical attendant certifies that he is prevented 'by illness or otherwise' from attending.

The Act
of 1891.
Ex Lord
Chancellors.

By Stat. 54 & 55 Vict. c. 53 (1891), *ex* Lord Chancellors are made *ex officio* judges of the Court of Appeal, but are not required to sit, unless with their consent at the request of the Lord Chancellor (§ 1).

By § 4 the High Court is a Prize Court within the meaning of the Naval Prize Act, 1864: subject to Rules of Court such jurisdiction shall be assigned to the Probate, Divorce, and Admiralty Division, and appeal lies to Her Majesty in Council as under the Naval Prize Act.

Again after eight centuries we see the Curia Regis, but it is the Court at Temple Bar, and not that at St. James'.

CHAPTER XIX

THE COURTS OF THE COUNTIES PALATINE AND OF WALES

THE counties palatine were Chester, Durham, and Lancaster. Whatever may be the precise date at which these counties became 'Palatine'¹, it seems likely that there was in Saxon times a jurisdiction equivalent to that of the Palatine earl, and originating in usurpation and necessity. The Central Government was too far away both before and after the Conquest to control effectually the administration of the Marches, which were always turbulent and lawless districts.

Grants of
Counties
Palatine.

The county palatine of Chester was granted by the Conqueror to his nephew, Hugh Lupus, and afterwards became one of the honours of the Prince of Wales.

The county palatine of Durham was granted to the Bishop of Durham by the same king.

The county palatine of Lancaster was granted in 1376 by Edward III to John of Gaunt, Duke of Lancaster, for his life, the duke to hold as freely as the Earl of Chester.

All these three grants were of full *iura regalia*.

'The power and authority of those that had counties palatine was kinglike, for they might pardon treasons, murders, felonies, and outlawries thereupon. They might also make justices of eyre, justices of assize, of gaol delivery, and of

¹ 'Palatine' probably means 'on the Pale' or 'Border.'

the peace. And all original and judicial writs, and all manner of indictments of treason and felony and the process thereupon, were made in the name of the person having such counties palatine. And in every writ and indictment within any county palatine, it was supposed to be *contra pacem* of him that had the county palatine¹.

Their absorption by the Crown.

By 6 & 7 Will. IV, c. 19 the palatine jurisdiction of the Bishop of Durham was transferred to the crown.

In 1461, the Duchy of Lancaster was permanently annexed to the crown.

In 1535, 27 Hen. VIII, c. 24 provided that none but the king should have power to make any justice of assize, of the peace, or of gaol delivery, in any county palatine or other liberty, and that all writs and indictments should be in the king's name, and laid as against the king's peace.

The commissions, however, to the county of Lancaster should be under the king's usual seal of Lancaster, in manner and form as before (§ 5).

Thus the Durham and Lancashire Assizes and Quarter Sessions were assimilated to those held elsewhere, except that the Lancashire commissions were under a different seal.

Till 1830 Chester had a local chief justice and second justice both appointed by the crown. These offices were abolished², and it was provided that the Assizes should be held in Chester and Wales as in other places, and that was the position at the time of passing the Judicature Act of 1873³, which enacted that the counties palatine of Lancaster and Durham shall respectively cease to be counties palatine as regards the issue of commissions of assize or other like commissions, but no further⁴.

¹ Coke, *Inst.*, iv. 204.

² 11 Geo. IV and 1 Will. IV, c. 70. ³ 36 & 37 Vict. c. 66, § 99.

⁴ The Court of the Chancery of Lancashire is still vi orous.

Of the courts in Wales it is perhaps sufficient to give a brief account.

The
Welsh
Courts.

When Robert Burnel drafted the great *Statutum Walliae*¹ for Edward I, he produced a complete scheme showing the divisions of the country, the courts and the officers, sheriffs, and coroners, and the writs in actions.

Six counties, viz. Anglesea, Carnarvon, Merioneth, Flint, Carmarthen, and Cardigan, were provided with a justice, sheriffs, coroners, and courts on the English pattern.

The rest of Wales was divided into districts called 'Lordships' Marchers,' subject to the hereditary rule of Lords Marchers who exercised despotic authority, and in which the king's writ did not run.

In 1535 and 1543 two statutes² were passed by Henry VIII abolishing the 'Lordships' Marchers,' and forming them into new counties, and establishing Welsh courts and judges quite separate from the English judicial system.

This arrangement lasted till 1830, when the statute³ was passed (see above) abolishing the separate jurisdiction for the county palatine of Chester, and the Principality of Wales.

One additional judge was added to each of the Superior Courts of Westminster, and Wales was brought into the judicial system of England.

¹ 12 Ed. I.

² 27 Hen. VIII, c. 26 and 34 & 35 Hen. VIII, c. 26.

³ 11 Geo. IV and 1 Will. IV, c. 70.

The
office of
coroner.

CHAPTER XX

THE CORONER

ALTHOUGH the coroner can hardly be said nowadays to occupy an important place in the administration of the criminal law, a duty for which a special training not available for a medical practitioner or a solicitor is required, and although the verdict of a coroner's jury carries little weight, for in that court the ordinary rules of legal evidence are not rigidly observed, yet the office is one of great antiquity, and at one time was a most important piece of the legal system. It is too early yet to say with anything like certainty—if indeed we shall ever know—what connexion, if any, the coroner's inquest had with the petty jury in the Crown Court, but some account can be given of this officer and his duties.

His
duties.

Briefly his duties are now, as they have been since the time of Edward I, to inquire into cases of suspicious death¹ and

¹ This institution, which some affect to consider moribund, seems on the contrary to exhibit both the fire of youth and the dignity of old age; see the South American mummy case (*Aitken v. London and North Western Railway, Times*, Dec. 11, 1901). This was an action against the railway company for damages for negligence in the carriage of a Peruvian mummy, which was broken in transit from South America to Belgium. In April, 1899, the package, sent from Liverpool and addressed to 'Maison de Melle, Belgium,' had been opened at Broad Street. An inquest was held—verdict, 'That the woman was found dead at the railway goods-station on April 15, and did die on some date unknown in some foreign country, probably South America, from some cause unknown. No proofs of a violent death are found. The body has been dried and buried in some foreign

of treasure trove, and the inquisition of the coroner to-day is as it always has been, a formal accusation of any person found by it to have committed murder or manslaughter, or to have found and concealed treasure, and a person may be tried on such inquisition without further accusation. In practice, however, cases of homicide are always investigated by a magistrate who commits to the Assizes or the Central Criminal Court, where the prisoner is indicted and tried, so that the inquiry before the coroner is superfluous, frequently embarrassing and occasionally mischievous.

It is not certain when coroners were first appointed. Bishop Stubbs gave 1194 (5 Rich. I) as the date, the twentieth article of the eyre of that year being the authority. The learned editor of the *Select Coroners' Rolls*¹ for the Selden Society finds evidence that they existed before that date.

The coroner was, as his name indicates, a king's officer², he was elected in the County Court³ at any rate after the Stat. of West. I, and his name was submitted to the king. His duty was to hold inquests as to the manner of death of those supposed to have died by violence, accident, or in prison, to apprehend the guilty and attach all who knew anything of the circumstances, or with whom the dead man lived, and keep them till the itinerants came, to look after deodands⁴, wreck, and treasure trove, to have them valued, manner, probably sun-dried and cave-buried, and the jurors are satisfied that this body does not show any recent crime in this country, and that the deceased was unknown and about twenty-five years of age.'

¹ Introd. xv-xix to which I am largely indebted.

² 'He hath principally to do with pleas of the crown—and in this light the Lord Chief Justice of the King's Bench is the principal coroner in the kingdom, and may (if he pleases) exercise the jurisdiction of a coroner in any part of the realm.' Bl., *Comm.*, i. 345.

³ There were usually four coroners in a county, but sometimes three or even two. Some boroughs had their own by special grant. Bristol for instance had four.

⁴ The instinct which leads the golfer to break his club so that it shall bring no more woes upon the human race, is inherited from his ancestors, who if death was caused by animals or inanimate objects took

and safely kept till the eyre came, to take 'appeals' and to hear criminal accusations which would presently be tried before the eyre. He was bound to keep a roll or official record of events since the last eyre, which he handed to the justices, who were enabled thereby to check the presentments of the various juries and get a fairly correct view of the local administration. He was the *oculus* of the king, but he was also the representative of the people, owing his position to their votes, and probably feeling considerable sympathy with them.

From the clause in Magna Charta 'nullus vicecomes constabularius vel coronatores . . . teneant placita coronae meae,' it may be inferred that he was in the habit of trying criminal pleas, and after that date he passed judgement on felons caught in the act. He frequently sat in the County Court with the sheriff, taking civil pleas, and in default of the sheriff executed the royal writ.

He also linked the Royal and Manorial jurisdiction, for it was his duty to be present in privileged baronial courts when felonies were tried, and to watch in the interest of the king, and he could enter 'liberties' when the sheriff was excluded.

vengeance on the offending object. The manslaying ox in Exodus xxi. 28 is to be stoned, the Athenians banished the axe (Aeschines, *κατὰ Κρητοφ.* 244, 245). In the second century after Christ Pausanias notes that they still sat in judgement on inanimate things in the Prytaneum (i. 28 (ii)). Mr. Tylor tells us that 'if a tiger killed a Kuki (Southern Asia) his family were in disgrace till they had retaliated by killing and eating the tiger or another; but further, if a man was killed by a fall from a tree, his relatives would take their vengeance by cutting the tree down and scattering it in chips.'

'Thus too by an ancient law,' says Blackstone, 'a well in which a person was drowned was ordered to be filled up under the inspection of the coroner' (Fleta, l. 1, c. 25, § 10).

The same underlying feeling explains the *noxiae datio* of the Roman Law. The thing is guilty: it, and not its owner, is to be punished. It is to be handed over to the relatives of the dead man to do what they please to it.

So in our law in death by misadventure, the thing causing the death

If a thief was caught red-handed on the land of a lord who had infangthef, the capital sentence could only be inflicted when the coroner was present.

In 1276 the so-called Statute de Officio Coronatoris¹ gives the coroner's duties, but a comparison with Bracton *De Corona*² suggests that the statute was merely declaratory of the existing practice.

The coroner was not paid though he got certain exemptions, and the office was not sought after.

Subsequent statutes³ have not affected his duties except in such details as summoning jurors and witnesses, but have provided him with a salary and he is now appointed by the County Council under the provisions of the Local Government Act⁴.

was forfeited, according to the laws of Ine and Alfred, to the kindred, but later in Bracton's time to God *pro rege*. In the thirteenth century the thing was taken by the sheriff or coroner or other officer and sold, and at the next eyre an order was made for him to account for its value. The justices could direct for what specific purposes the money should be applied, charitable or public, *pro deo*. Thus, when in 1221 some persons fell out of a boat on the Severn and were drowned, the record says, 'value of boat eighteen pence, dentur deo ad pontem,' i. e. to build a bridge (*Select Pleas of County of Gloucester*, 55). The Church seems to have seen an opportunity of making a claim on the ground that as the person died unconfessed in actual sin, the thing should be devoted to buying masses for his soul, in the same way as the apparel of a stranger found dead was applied to that purpose.

Blackstone speaks of the deodand as forfeited to the king to be applied to pious uses and distributed in alms by his high almoner (*Inst.*, i. 300). 'It matters not,' he says, 'whether the owner were concerned in his killing or not, for if a man kills another with any sword, the sword is forfeited as an accursed thing. And therefore in all indictments for homicide, the instrument of death and the value are presented and found by the grand jury (as that the stroke was given by a certain penknife value sixpence) that the king or his grantee may claim the deodand' (*Inst.*, i. 301).

The accursed thing was known as the 'bane.' Deodands were abolished in 1846 (9 & 10 Vict. c. 62).

¹ 4 Ed. I, st. 2.

² Lib. 3, c. 5.

³ 3 Hen. VII, c. 2; 25 Geo. II, c. 29; 23 & 24 Vict. c. 116.

⁴ 51 Vict. c. 41.

The Coroner's Inquest.

The coroner's jury.

The composition of the coroner's jury or inquest varied. As a rule it was made up in whole or part of representatives of the four neighbouring townships (*villatae*) including that in which the dead body was found.

The most common constitution was twelve men, representing, it is suggested, the hundred, and the reeve and four men from each township, making thirty-two in all. There was no invariable method in which the verdicts were given. They might be given separately, one by the townships, one by the hundred, or each township might give its verdict apart from the others; sometimes the inquest was *per duodecim iuratores*, the *duodecim* coming from the townships.

Was it related to the petty jury?

This much is not doubted, but if we go a little further we find ourselves in the region of conjecture. We are aware that it was the duty of the four townships to present felonies in the hundred or County Courts, and also that when the judges came round, twelve *iuratores* of the hundred had to present persons accused of crime.

When the ordeal was in vogue, the procedure was simple, but when the Lateran Council condemned the ordeal, what exactly was the system that took its place? There is a jury of twelve men who are required *praecise dicere* 'guilty' or 'not guilty.' If they say 'guilty,' the representatives of the four townships are sworn, and if they agree, sentence is pronounced.

At the present day we are familiar with presentation by a grand jury which is similar to the presenting jury of the thirteenth century, and with the petty jury which tries the case and says 'guilty' or 'not guilty.' But what we do not know is who were the mediaeval representatives of our petty jury. Were they the second jury of twelve, or were they the representatives of the four townships, or were they neither?

One or two points may be borne in mind. Juries were expected to give their verdict from their own knowledge, the word 'knowledge' being used in a wide sense; the four townships came sometimes to present with the hundred, seemingly when the hundred jury was in doubt; the four townships had already investigated the affair with the coroner, and at some inquests had heard 'evidence' not of jurymen¹, so that they would be in full possession of the circumstances.

The question will be approached in treating of the Criminal Jury; in the present state of our knowledge it must suffice to say that the great authority of the learned editor of the *Select Coroners' Rolls* favours the paternity of the four townships, while Professor Maitland, who once inclined to that view, apparently on further examination thinks the evidence not yet sufficient.

¹ *Select Cor. Rolls*, p. 52.

CHAPTER XXI

THE JUSTICES OF THE PEACE

The Peace
and its
'conservators.'

THE 'peace' was practically the criminal law, and to maintain it was one of the prerogatives of the crown. There was a variety of persons who were charged with the duty; great officers of the crown, such as the judges of the King's Bench, were *ex officio* guardians or 'conservators' of the peace, some were so by tenure or prescription, some were elected in the county courts, as coroners, some carried extraordinary commissions from the king¹.

Statutory regulation.

The reign of Edward III was heralded by bloodshed, and the king being a minor, special measures were taken against disorder. The Statute 1 Ed. III, st. 2, c. 16, provided that in every county good men and lawful should be 'assigned to keep the peace' with, however, very limited authority.

Three years later they were given the power of receiving indictments, and of keeping the persons indicted in custody till the judges of gaol delivery came round².

By 18 Ed. III, st. 2, c. 2 *judicial* powers were conferred on them, viz. to hear and determine felonies and trespasses against the peace with others wise and learned in the law, and to inflict punishments reasonably.

¹ The office may possibly have germinated from the frank-pledge system, cf. the *Dooms of Canute*, c. 21; Stubbs, *Sel. Ch.*, p. 74; the *Assize of Clarendon*, §§ 1, 8; *ibid.*, 143; and the *Edictum Regium*, A. D. 1195; *ibid.*, 264.

² 4 Ed. III, c. 2.

By 34 Ed. III, c. 1 separate commissions were provided for each county. The qualifications requisite and the extent of the duties are set forth, and authority given to hear and determine, at the king's suit, felonies and trespasses done in the same county, and to take sureties for good behaviour.

In 1388 the number of justices in each commission was fixed at six, not counting the judges of assize, and they were directed to hold their sessions four times a year. The C
of Qua
Sessio

Some later statutes were passed in the next reigns under which the restriction on the numbers was removed, and by which the dates of the sessions were fixed, but the court formed in 1388 is substantially the Court of Quarter Sessions of to-day. Its times of meeting are now regulated by 11 Geo. IV, 1 Will. IV, c. 70.

The activity of the justices seems not to have been all that was desired, for the Statute 4 Hen. VII, c. 13 recites that the justices of the peace have been negligent and misdemeaning, and directs that complaints must be made to the king or his chancellor, which probably means 'making a Star Chamber matter of it.' In Henry IV's reign they were directed by statute to put down riots, with the sheriff and his 'posse,' and were told that they could only imprison people in the common gaol, which looks as though they had been using their own castles for the purpose.

The jurisdiction of Quarter Sessions rested till 1842 on these statutes and on the commission issued thereunder, which was 'settled' in 1590 and has been in use ever since, which embraced all crimes except treason, subject only to this, that in cases of difficulty a judge of one of the benches or of assize ought to be present. This jurisdiction was exercised and sentences of death were pronounced and executed accordingly. But in practice these powers were gradually dropped, and the limits of jurisdiction are now settled by 5 & 6 Vict. c. 38, which removes the cognizance of treason, murder,
o 2

capital felony, felony punishable on first conviction with penal servitude for life, and some other specified offences. By 59 & 60 Vict. c. 57, Quarter Sessions were empowered to try cases of burglary.

and procedure.

The procedure at Quarter Sessions is as at Assizes, by presentment by a grand jury and trial by a petty jury. The Quarter Sessions also hear appeals by way of rehearing from convictions at petty sessions, and also appeals in Licensing, Rating, and Poor Law matters.

Borough Quarter Sessions.

The Recorder.

Of the Borough Courts of Quarter Sessions it must suffice to say that from very early times charters of incorporation have been granted to towns, containing grants of courts of varying importance. In such cases the corporation was generally authorized to appoint a judge of their own, usually a Recorder, with criminal and sometimes civil jurisdiction. In 1834 these charters and jurisdiction were investigated by a Commission, following on the report of which the Municipal Corporations Act, 5 & 6 Will. IV, c. 76, was passed, empowering the crown to grant a separate Court of Quarter Sessions to any borough scheduled in the Act, that presents a petition stating the salary that it is proposed to pay the Recorder, and the right to appoint the Recorder is transferred to the crown. The Recorder is to hold his court four times a year or oftener, and he is the sole judge of the court.

In matters of crime the procedure and jurisdiction of such a court is identical with that of the County Quarter Sessions.

The law on the subject was consolidated by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50).

Courts of Summary Jurisdiction.

Summary jurisdiction.

Statutes at various times gave power to one or two justices sitting together, to inflict summarily small penalties on unimportant offences, such as trifling nuisances or misconduct,

such as profane cursing or swearing¹. ‘Summary jurisdiction’ imports trial without either grand or petty jury.

By 11 Hen. VII, c. 3, justices of assize and justices of the peace may upon information hear and determine, *without a jury*, all offences, except treason, murder, or felony, committed against any statute not repealed.

This Act was repealed in the next reign, but was the beginning of summary jurisdiction in its more extended sense.

The procedure to be used was left very vague, and was at last regulated by 11 & 12 Vict. c. 43.

Under several statutes passed in 1828, 1847, 1849, 1855, 1861, 1871, and 1879, provision was made for dividing counties into petty sessional divisions, and the offences triable thereat and the penalties which may be inflicted were therein declared.

Petty Sessions.

It is enough to say that, except where by statute one justice sitting alone may act, two justices sitting together have a petty criminal jurisdiction over what may be called police offences and minor breaches of the peace, with a power of inflicting terms of imprisonment not exceeding six months. Where, however, the offence, other than assault, is punishable with more than three months’ imprisonment, the accused has the option of being tried at the Quarter Sessions or Assizes before a jury.

The justices of the peace are appointed by the crown acting through the Lord Chancellor, who takes the recommendation of the Lord Lieutenant in the case of the county bench.

Stipendiary magistrates exist in the metropolis, and other The stipendiary.

¹ 19 Geo. II, c. 21.

towns in virtue of various statutes. They are appointed by the crown on the advice of the Home Secretary, and when acting judicially have all the powers of two justices of the peace sitting together. Like the justices of the peace they hold office 'durante bene placito.'

CHAPTER XXII

CRIMINAL TRIALS AND THE CRIMINAL JURY

SINCE the Norman Conquest there have been three modes of trial in criminal cases—by ordeal, battle, and jury: and three modes of accusation—appeal, or accusation by a private person, indictment, or accusation by a grand jury, or an information either by the Attorney-General or the Master of the Crown Office¹. We do not count compurgation as one, for this in criminal cases did not long survive the Norman Conquest, though in civil actions, as Wager of Law², it maintained a shadowy existence till 1834, when its appearance in *King v. Williams*, 2 B. & C. 538 having informed the legislature of its existence insured its abolition by 3 & 4 Will. IV, c. 42.

¹ A criminal information may be preferred only for misdemeanours, and only by the Attorney-General, the Solicitor-General, or the master of the Crown Office ‘on the order of the Queen’s Bench Division made on motion heard in open Court’ (cf. 4 Will. & Mary, c. 18). This was passed because the Master used to lend his name to any one who wished it, and thus private persons could frivolously bring a malicious prosecution against a defendant without the intervention of a Grand Jury.

The law officers, there is reason to suppose (*R. v. Berchet and others*, 1 Show. 106–21, 1689), exercised this right from temp. Edward I to the Revolution in the King’s Bench without indictment by Grand Jury, and the procedure was ordinary before the Council and Star Chamber, and is recognized and regulated by several Acts of Parliament.

² So called from the preliminary stage of giving pledges to perform it.

Appeal

(1) *Appeals.* The history of appeals and battle goes together, for battle was properly an incident of an appeal, although it found its way into the civil courts eventually. Appeals were deemed a most important part of the criminal law, as might be expected, at a time when neither justice nor police was well organized and the principal weapon available for the administration of criminal justice was private revenge.

Trial by combat or Wager of Battle was a form of legal procedure familiar to the Normans, though there is no trace of it in Anglo-Saxon history. Ordeal was, on the other hand, well known here. Combat may be said to be a bilateral kind of ordeal: both were appeals to the judgement of God. To suit the habits of his Norman and Saxon subjects the Conqueror ordained that if a Frenchman appealed an Englishman of theft, murder, homicide, or rapine, the Englishman could defend himself either by ordeal or duel, and if he were infirm, by a champion. If the Englishman appealed a Frenchman and declined proof by ordeal or battle, the Frenchman nevertheless had to purge himself by the unbroken oath of compurgators¹. In cases where there could be no battle, and no witnesses could be found, or the man was of notoriously bad character, he went to the ordeal.

The proper method of suing an appeal of felony was for the complainant to promptly raise the hue, go with it to the nearest vills, and there declare the crime, then go to the king's serjeants, then to the coroners, and then to the next county court.

At this county court, before the sheriff and coroners, the appellor made a formal and detailed statement, in order that the appellee might know what he had to answer. If the appellee did not appear he was called or 'exacted' at the next four consecutive county courts. If the appellee did not then appear, judgement of outlawry was given. If

¹ Stubbs, *Sel. Ch.*, p. 84.

the appellee appeared, the appeal was removed by writ into the king's court¹ where the appellee raised any plea or exception he thought fit. If he did not plead, or pleaded inadequately, battle was directed between the parties, but the judges were to inquire, and not allow battle if the circumstances were such that there were 'presumptiones quae probationem non admittunt in contrarium,' as for instance, if an appellee was caught standing over the dead man with a bloody knife, or taken with the 'mainour.' This is an application of the general rule of our early law, that if a culprit is taken red-handed, no accuser is wanted, and no defence allowed; he is convicted. Nor was battle allowed if the appellant was maimed, over sixty years of age, or an infant. In most cases after the disappearance of 'ordeal' appellees had the option of defending themselves *per corpus* or *per patriam*, but not always. In secret crime, such as poisoning, he must defend himself *per corpus*, for, as Bracton says, the *patria* could know nothing of a concealed fact like this. If the appellee was defeated before the stars appeared he was hanged: if not, or if he won, he was acquitted from the appeal, but as the appeal raised a presumption of guilt, he was tried by the country as if he had been indicted.

The only appeals which had any definite history were those in murder. This seems to have been the usual way of prosecuting murder to the end of the fifteenth century. Indeed, in 1482 (22 Ed. IV), it was determined that a homicide should not be arraigned at the king's suit within the year, in order to save the suit of the party, because by the Statute of Gloucester (6 Ed. I, c. 9), an appellor was restricted to a year and a day within which to bring his appeal. This was so mischievous, that four years later (1486) we find a clause in the statute known as the Star Chamber Act, 3 Hen. VII, c. 1, which recites that 'the party is oftentimes slow and also agreed with, and by the end of the year all is

¹ *Sel. Cor. Rolls* (Seld. Soc.), 66.

forgotten, which is another occasion of murder. And also he that will sue any appeal shall sue in proper person, which suit is long and costly that it maketh the party appellant weary to sue.' Indictments for murder accordingly are to be tried at once, and an acquittal on an indictment is to be no bar to an appeal. Thus, an indictment was usually tried first, and was practically conclusive, unless the prisoner was acquitted under circumstances which greatly dissatisfied the relatives of the dead man. In 1819 appeals were finally abolished by the Statute 59 Geo. III, c. 46, following on the appeal in *Ashford v. Thornton*¹.

Accusa-
tion 'per
famam.'

Present-
ment.

Compur-
gation.

Ordeal.

Public
fame.

(2) *Accusation by public report—ordeal—trial by jury.* In the Laws of Ethelred², which in this connexion refer to the northern parts of the realm, it is provided that in every wapentake the twelve superior Thanes or freeholders, who were at the gemot, shall go out with the reeve and swear on the relic that they will accuse no innocent man nor conceal any guilty one. The form survives to the present day in the oath of the grand jury. If the man was taken in the act the thing was clear and he got no trial; if not, he was required to clear himself by oath, if he was oath-worthy. To find out whether he was credible or oath-worthy he had to bring up people who would support him—'compurgators,'—other freeholders, frequently eleven, who swore that they believed him.

Ordeal was apparently employed when the man was not credible, or there was want of satisfactory evidence. It was not unknown in the highest court to try and convict upon public fame alone. Thus the judgement on the Mortimers was on common fame recorded by the king: 'les quieux tresons felonies roberies homicides arsouns mavesties et chevauchees as baneres desplies sount notories et conuz el roialme et nostre Seignour le Roy ceo record sur vous.'

¹ 1 B. & Ald. 405.

² Stubbs, *Sel. Ch.*, p. 72.

In 1176 the Assize of Northampton appeared. It was a recension of the Assize of Clarendon (1166) with some additions and alterations, making it more rigorous. The provision that we are at present concerned with was this: that 'if any one were accused before the justices of our lord the king of murder, theft, or robbery, or harbouring men who do such things, or forgery, or arson, by the oath of twelve knights in the hundred, or if no knights, twelve lawful men and four men from each township in the hundred, let him go to the ordeal of water and if he fails let him lose a foot and the right hand, and exile himself within forty days. If acquitted by ordeal let him find pledges and remain unless the accusation be of murder or base felony, when he must abjure the kingdom in forty days¹'.

An accusation therefore of murder or base felony was equivalent to banishment at the least.

As an instance of accusation by common fame we can refer to the Roll of the Iter of Wiltshire, 10 R. I.—'The jurors say that Radulphus Parmentarius was found dead with his neck broken, and they suspect one Cristiana, who was formerly the wife of Ernaldus de Knabbewell, of his death, because Radulphus sued Cristiana in the ecclesiastical court for breach of a promise of marriage she had made to him, and after the death of her husband Ernaldus, Reginald a clerk frequented her and took her away from Radulphus, and Reginald and Cristiana hated Radulphus for suing her, and on account of that hatred the jurors suspect her and the clerk of his death. And the country says it suspects her.

¹ Stubbs, *Sel. Ch.*, p. 151. This 'implied prohibition' practically abolished compurgation in the king's courts in the graver criminal cases, though it lingered on in the local and ecclesiastical courts. The method was much valued in pleas of the crown, as it was considered more favourable to the prisoner than a jury, and was jealously preserved in London (see the Royal Charters of Hen. I, II, III, John, Ric. I, II, and Ed. I, II, III).

Therefore it is considered that the clerk and Cristiana appear on Friday, and that Cristiana purge herself by fire.'

But ordeal had not long to live. Rufus had commented on it very unfavourably as a method of discovering truth, when fifty men accused of killing the king's deer emerged triumphantly from the ordeal. The king said that in future he himself and not God would try these cases¹.

Disappearance
of ordeal.

The Lateran Council in 1216 condemned the ordeal, and prohibited the clergy from assisting at it. In our country this direction met with immediate obedience². By letters patent, issued January 26, 1219, an Order in Council was sent after the judges who had already started on their eyres, telling them that the Roman Church had prohibited judgement by fire and water, and directing them generally that in the circumstances, if grave crimes were brought before them, the prisoners must be kept in strict custody 'ita quod non incurvant periculum vitae et membrorum.' This last provision disappears in the Statute 3 Ed. I, c. 12, which directs prison 'forte et dure'; if there were crimes of a middle character, where ordeal would have been employed, the accused are to abjure the realm, and in trifling offences they must give pledges to keep the peace, but the judges are to use a large discretion.

Difficulty
about a
substi-
tute.

But nothing is said in the Order about putting the accused persons on their trial. The truth was that a very great difficulty had now been raised. Trial by ordeal and com-

¹ The king 'stomachatus' said 'Quid est hoc? Deus est iustus iudex? Preat qui deinceps hoc crediderit. Quare per hoc et hoc meo iudicio amodo respondebitur non Dei, quod pro voto cuiusque hinc inde plicatur' (Eadmer, *Hist.*, 102).

² In 1679 the Jesuit Gavan startled the Court by asking to be tried by ordeal. To which the L. C. J. humanely replied, 'You are very fanciful, Mr. Gavan; you believe that your cunning in asking such a thing will take much with the auditory: but this is only an artificial varnish: our eyes and understandings are left us, though you do not leave their understandings to your proselytes' (7 *St. Tr.*, 383).

purgation had gone, but the accusation by a grand jury remained, and there was no method left of ascertaining the truth of the accusation. Battle was a method of proof only allowed in the case of appeals. The king at whose suit the criminal was prosecuted could not bring an appeal, for he did not see or hear the crime¹, and he could not fight. The only way was trial by the country, just as in an appeal by a woman or a maimed man, for these were not expected to fight.

But what was to be done if the prisoner declined to put himself upon his country? It seems that for some reason or other it was considered an impropriety to direct an inquest without first having got his consent. It may be that it was considered that mere human testimony was not enough when a man was being tried for his life. Indeed in the *leges Henrici* it is said that 'no one is to be convicted of capital crime by testimony'; apparently the judgement of God ought in such a grave matter to be invoked. Yet an inquest was not obscurely indicated. In criminal as in civil cases 'exceptiones' were tried by inquisition either by consent or by purchase from the king, the most important being the 'exceptio de odio et atia' which alleged malice in the accuser, and inferentially the innocence of the prisoner. Such an 'exceptio' was frequently decisive². Sir F. Palgrave gives instances of persons accused by presentment, even before the ordeal went out of use, buying from the king the benefit of going before an inquest of *legales milites*, to have it pronounced 'utrum culpabilis sit inde necne.' And in the petty Assizes the inquest was compulsory.

Still what was to be done? It is evident that the judges hesitated, but at Warwick in 1221, Martin Pateshull, finding two prisoners who refused to put themselves on their country,

¹ 'Cadit appellum ubi appellans non loquitur de visu et auditu,' Bract. ii. 434.

² Such an inquisition was given gratis. Mag. Ch. c. 36.

as the phrase went, chose twenty-four knights, who endorsed the accusation of the twelve men of the hundred, and on that hanged them both¹.

Consent
to be com-
pelled.

The usual method, however, was to try to compel the man to consent to an inquest. He was placed in rigorous confinement, put in irons, and fed on alternate days on bad bread and stagnant water till he either pleaded or died. In the case of *Hugo*, when he refuses to plead, the judge says that he had much better do so. ‘*Scilicet uno die manducabitis et alio die bibetis : et die quo bibitis non manducabitis et e contra : et manducabitis de pane ordeaceo et non salo et aqua*²’.

The *peine
forte et
dure*.

But this developed into the extraordinary procedure known as the *peine forte et dure*, which was that he was to be stretched on his back naked, and to have iron laid upon him, as much as he could bear and more; indeed, as late as 1726, one Burnwater, who was accused at Kingston Assizes of murder, refused to plead, and was pressed for an hour and three quarters with nearly four hundredweight of iron, after which he pleaded not guilty, and was then tried, convicted, and hanged.

In 1658 Major Strangeways was pressed to death in ten minutes, under a wooden frame, with weights on it placed anglewise over his chest; several persons standing on the frame to hasten his death. A milder form of persuasion, by tying the thumbs with whipcord, was practised in 1734 at the Old Bailey³.

¹ *Sel. Pleas of the Crown* (Seld. Soc.), 99–101. See also (ib. 127) the case, in 1220, of the man who put himself on the counties of Essex or Norfolk or Southampton or all of them, as to his good character, and then on the county of Surrey or upon all the men in England that knew him. Then came twenty-four knights of Surrey at the king’s command. And he put himself on them, and was hanged.

² Y. B., 30 & 31 Ed. I (Rolls Series), 529.

³ Steph., *H. C. L.*, 300.

The practice was not formally abolished till 1772, by 12 Geo. III, c. 20, when standing mute was made equivalent to a conviction. By 7 & 8 Geo. IV, c. 28 it was directed that a plea of not guilty should be entered in such a case.

The object of refusing to plead in a felony was that, as there was no conviction, there was no forfeiture, and the property of the accused person was thus saved. But if the man did put himself upon his country, how was he tried? We know from Bracton something of what took place when the itinerants came round. They came, read their commission, talked about their useful errand, withdrew, and called to them four or six *busones comitatus*, told them their duties, swore them to obey, went back to court, summoned the bailiffs of the hundreds, swore them to choose four knights for each hundred, who came and swore to elect twelve other knights, or *liberos et legales homines*. These twelve were scheduled, and, when produced, were sworn. The *capitula* were read to them, and they had to bring their answers on a certain day, and to say amongst other things against whom there was a common fame.

The presenting jury.

It was not necessary for the presenting jury to believe in the report which they made, and it is fairly certain that they would omit nothing that they could remember, for the judges in eyre had other sources of information, and notably had before them the sheriff's and coroner's rolls, which told them a good deal that had gone on in the county since the eyre last came, and omissions on the part of the presenting jury were visited with amercements. If *A.* is presented by the jury as *malecreditus*, i.e. as a 'suspect,' the judges question the jury about the grounds of the report, whereupon, says Bracton, some one will perhaps say, or the greater part may say, that their presentment was learned from one of themselves, and this is investigated. The report may at last be traced 'ad aliquam vilem et abiectam personam,' one to

whom credit is not to be given. If the matter is proceeded with, the person who is presented is asked how he will clear himself, and we will assume that he puts himself on his country.

The jury
of deliver-
ance.

Though what happens now is disputed (for it appears that the view taken by Mr. Justice Stephen, in his *History of the Criminal Law*¹, does not commend itself to Professor Maitland²), it seems likely that the presenting hundred jurors are again asked a question. They have been already sworn, and they are now asked to say ‘guilty’ or ‘not guilty,’ which is a different question to the question they answered before. If they say ‘not guilty,’ the man is acquitted; if they say ‘guilty,’ the four nearest townships are summoned and asked the same question. Sometimes the jury of another hundred is sworn, and asked if they support the verdict of the presenting jury. If they all agree, sentence is passed upon the accused; but the practice must have been unsettled, for we find in the pleas of the county of Gloucester³ that Marinus of Winchcombe, who was accused of homicide, gave two marks for having an inquisition whether he was guilty or not, and it is said that the jurors of Winchcombe, of Kiftegate, and of Gretestan, ‘dicunt praecise quod non est culpabilis et ideo quietus.’ One presumes that he was presented by a Winchcombe jury, and, if that is so, it is clear that the body which presents and the body which *praecise dicit* ‘guilty’ or ‘not guilty’ is not identical; but it was the early practice to have some of the indictors on the trial jury, otherwise ‘it was not well for the king⁴.’ Still a feeling was growing up that none of those who presented an accused person should be on the inquest which tries him, and this was embodied in a statute of 1352⁵.

¹ Viz. that there were two juries, i. 258.

² *Pleas of the Crown for the County of Gloucester*, xliii.

³ *Ibid.*, 13.

⁴ Y. B., 14 & 15 Ed. III, 261.

⁵ 25 Ed. III, st. 5, c. 3.

In Britton, which is a recension of Bracton (1291–2), the functions of the presenting jury are stated to be as above, but the trial comes before other jurors who are directed as to the points which they are to decide. If they cannot agree, they are to be separated and examined as to why they cannot agree, and if the greater part of them know the truth, and the other part do not, judgement shall be according to the opinion of the greater part. And if they declare upon their oaths that they know nothing of the fact, ‘let those be called which do know it; and if he who put himself on the first inquest will not put himself on a new jury, let him be remanded back to penance, till he consents thereto¹.

It will be noticed that though we have got as far as a jury to present, which corresponds to the Grand Jury of to-day, and another to try, both juries give their verdict from their own knowledge of the facts. And ‘knowledge’ included information which they gathered by informal investigation, so much so that according to Britton the jurors may be strictly examined by the justices as to ‘how they are informed of the truth of their verdict,’ when it may be discovered to be mere tavern gossip or worse.

Functions
of the
juries.

We know that the trial or petty jury has now a different character, for it gives its verdict according to the evidence and not from its own knowledge. In the book which Fortescue wrote between 1460 and 1470, *De laudibus legum Angliae*, there occur expressions of an ambiguous nature which leave it in doubt how far the change has progressed, as that ‘the law of England never decides a cause only by witnesses when it can be decided by a jury of twelve men².

It is to be observed, however, that witnesses are not unknown at a much earlier period than this. Thus, in the

¹ Britton, 31, 32.

² c. xxxii.

case of William, the son of Matilda¹, who was tried for murder, many bystanders testify that they saw him do the deed, and took him with the weapon in his hand, the four townships also agree, and twelve juratores say that he is guilty. There is nothing anomalous in this, for the jury were at liberty to make what inquiries they chose.

Again, as early as Bracton², the accused could challenge jurors on the ground of enmity or corruption, and Fortescue states that a person accused of felony could peremptorily challenge thirty-five jurors, a right which, if the jurors were the witnesses and could not afterwards give evidence, would make a conviction almost impossible.

It seems that this is a period of transition.

After a considerable period, when the petty jury began to be considered judges of presumptions rather than witnesses, the practice started of bringing in written papers, depositions, informations, and examinations taken out of court. But it was a long time before it was thought necessary to produce evidence to support a prosecution, and longer still before the prisoner was allowed any evidence at all.

A method of trial, where witnesses in our sense are rarely if ever called, may do its work well enough in a small community where everybody knows what everybody else is doing; but these primitive conditions did not last for ever, and when they changed, the position of an accused person must have been, according to modern notions, extremely harsh and difficult. He was not permitted to call witnesses. Queen Mary is said to have directed the judges to allow prisoners to call witnesses in felony: but this was regarded as an indulgence, the rule being that witnesses were not to be heard against the crown, even in felony, and if such witnesses were called, they were not sworn.

¹ Pleas of the Crown for the County of Gloucester, 92.

² ii. 454.

Before the great civil war the following were the features in which a criminal trial differed from a criminal trial of to-day. (1) The prisoner was confined more or less secretly, and could not prepare his defence. He was examined, and his examination taken down and used against him. (2) He had no notice of the evidence which was going to be produced against him. (3) He had no counsel either before or at trial. (4) There were no rules of evidence as we understand them. The witnesses were not necessarily confronted with the prisoner, nor were originals of documents produced, the confessions of accomplices were not only admitted, but were regarded as specially cogent. (5) The prisoner was not allowed to call witnesses on his own behalf; had he been permitted, he could not have done so with effect, for he could not find out what evidence they would give, or procure their attendance. In later times they were not examined on oath even if they were called.

Earlier
criminal
trials : the
position
of the
prisoner.

After the civil war some improvements were made. In 1695¹ persons indicted for high treason or misprision of treason were to have a copy of the indictment five days before trial, and to have counsel, and witnesses upon oath. In 1708² the prisoner was allowed to have a list of the witnesses and of the jury ten days before his trial. In 1702³, in cases of treason *and felony* the prisoner's witnesses were to be sworn as well as the witnesses for the crown.

A practice also sprang up, the growth of which cannot be traced, by which counsel were allowed to do everything for prisoners accused of felony except address the jury for them. This we find in operation in 1758⁴. On the other hand, at the trial of Lord Ferrers, two years afterwards, the prisoner was obliged to cross-examine the witnesses without the aid of counsel, and was even put in the embarrassing position of

¹ 7 & 8 Will. III, c. 3. ² 7 Anne, c. 21. ³ 1 Anne, st. 2, c. 9.

⁴ *William Barnard's case*, 19 S. T. 815.

having to examine the very witnesses called to prove the defence of insanity which he himself was setting up. By 6 & 7 Will. IV, c. 114, all prisoners accused of felony are permitted to make their full defence by counsel.

It is pointed out by Mr. Justice Stephen¹, that the experience of the reigns of Charles II and James II showed that juries might be quite as unjust and tyrannical as the Star Chamber, and that they were equally likely to be unjust on any side in politics. After the Revolution, when one of the great parties of the State had won a decisive victory, the administration of criminal justice became decorous and humane, and as it was mainly left in the hands of private persons between whom the judges were really indifferent, the questions which were involved came to be fully and fairly investigated, it being left to each party to the contest to do the best he could to establish that view of the case in which he was interested.

¹ *H. C. L. i.* 426.

CHAPTER XXIII

CIVIL PROCESS AND THE CIVIL JURY

EARLY civil process in this country presents two noticeable features, one that there is no weighing of evidence, for the methods are those of proof and not of trial, the other, that all complaints must be made probable, before the defendant can be called on to defend himself. Such *monstratio probabilis* might be a preliminary oath, visible confirmation in the shape of document or tally, or some witnesses who supported the complainant.

Proof was one sided, and the battle was usually won or lost when the court settled who was to give the proof. To be given the proof might be a burden, or it might be a privilege, it might mean victory, it might mean disaster. Questions of such delicacy and importance were not permitted to arise without some *prima facie* evidence produced by the complainant. His bare word, or ‘simplex vox,’ was not good enough¹.

The complainant’s witnesses were called the ‘secta.’ The secta was not necessarily sworn or even examined for the plaintiff, but the defendant could, if he chose, state his case on the examination of it, and if it disagreed he won. If it agreed, he was allowed to wage his law and produce twice as many, up to twelve, to support him. If these would not swear or disagreed he lost². Otherwise the ‘secta’ was not sworn; it

¹ Cf. Mag. Charta, § 38.

² But the defendant was not allowed to wage his law against a

was frequently made up of relatives or dependants, and at a later date was not even produced¹, though it survived as an allegation in pleading till 1834, ‘and therefore he brings his suit.’

Profert of deeds, the last relic of the *monstratio probabilis*, was not abolished till 15 & 16 Vict. c. 76, § 55.

Methods
of proof.

In trying a case, resort might be had to ordeal, battle, oath, or witnesses.

The two first may be dealt with briefly, for they did not live long.

Ordeal, an appeal in more than one form to the judgement of God, though not so frequent in civil as in criminal process, was not uncommon in cases relating to lands² or status³, but fell into disuse after the decision of the Lateran Council.

Battle is described by Glanvill as one of the chief modes of trial in the King’s Court as in cases of debt, and we have seen that it was the ordinary mode of determining a ‘writ of right’; the witnesses came prepared to fight⁴, and could be challenged by the other side.

But this method was hated by the English; the charters and usages of various towns as London and Ipswich gave exemption from it, and it died a lingering death after the institution of Henry’s Grand Assize⁵. The Statute 59 G. III, c. 46 abolished the process with special reference to its use in appeals and in writs of right.

Originally the champion was the witness who offered to prove his statement *per corpus suum*⁶.

writing, his proper defence being *nient le fait*, i. e. it is not the defendant’s deed.

¹ In 1343 the court declined to examine the ‘secta,’ tender of it being only formal (Y. B. 17 Ed. III, 48. 14).

² Pl. Ang.-Nor., 40–43. ³ Ibid., 43. ⁴ Ibid., 19.

⁵ In 1304 the court refused to allow battle in trespass, though the parties had agreed (Y. B. 32, 33 Ed. I, 318–20).

⁶ This identity was made unnecessary by Stat. of Westminster I, c. 41.

The Oath, if taken by the defendant, was sometimes allowed to clear him. But the popular mediaeval method was the oath of the defendant supported by oath helpers, or as they are now called compurgators. These were not witnesses of fact, but rather to character, and appeared as believers in their principal¹. They might be kinsmen². It was the chief method of trial in the popular courts, and in the King's Court in personal actions, and was marked by excessive addiction to formality. Although highly prized this method of 'wager of law' became exceptional, surviving chiefly in actions in debt and detinue, till its unexpected appearance in *King v. Williams*³ led to its abolition by statute in 1832⁴.

Witnesses. Before Henry invented his Assizes and brought the Inquest or Recognition into fashion, justice was done in the local courts and judgement given by the *pares curiae*. Some members of the court might have personal knowledge of the facts; if not, there was the form of one-sided proof, without cross-examination. But we know that Edgar's ordinances provided official witnesses for sales of chattels, twelve at least in every hundred and small 'burh,' thirty-three in other 'burhs.' This was for the protection of buyers, for unexplained possession of a movable which a week ago notoriously belonged to some one else is apt to be dangerous in primitive society. Such persons naturally informed the other *pares curiae* their fellows.

Witnesses were also used to prove age, or death. So in 1219⁵ the defendant said the plaintiff was a minor. This the plaintiff denied, and said the court might inspect him, and if they doubted he would bring his mother and relatives. The

¹ On the possible explanation of this institution see ch. iii.

² For a curious case of selecting compurgators by chance see B. B. of Ad. ii. 170, 173.

³ 2 B. & C. 538.

⁴ 3 & 4 Will. IV, c. 42.

⁵ Bract. Note Book, ii. case 46.

court said he must bring twelve *legales homines*. This was not a jury, for he could select whom he pleased. According to Bracton such a one swears he is twenty-one and the rest swear the oath is true, and then they have to give reasons for their belief, and each gives his reason¹. The delicate and dangerous question of a lady's age was apparently reserved for the court on personal inspection². By the time of Henry VII the question might be settled by a jury³.

The
'exceptiones.'

A fresh beginning was made when Henry II adapted the system of Inquests to the Assizes. The recognitors of the Assize, or shortly 'the Assize,' was a small body chosen *ad hoc*, as being likely to know the truth of the matter in dispute. But it was summoned to answer a particular question and no more, and the defendant could raise 'exceptiones' which had the effect of deferring or possibly destroying the assize. He could raise an 'exceptio' to the writ or the person or the assize. If he excepted to the assize, all the 'operative words' could be disputed such as *iniuste et sine iudicio—disseisivit eum—de libero tenemento suo—in tali villa*. All these exceptions were 'out of the assize,' and could not be determined by the recognitors of assize. They were subsidiary; and at first not being cognizable by the assize were tried by battle, unless either by consent or order of the court, or *per preceptum domini Regis*⁴ the verdict of a *iurata* or jury was taken which was sworn *ad hoc*. Com-

The
'iurata.'

¹ Requisitus qualiter hoc scit; 'what made you particularly notice that year?' 'Oh! a fire burned my neighbour's house down on the day he was christened, personaliter interfui.' Just the same form of stock question, one may notice, as to-day is put to a witness who comes to prove an *alibi* (*Liber de Ant. Leg.*, *Camden Soc.*, cxlix-cliii).

² Even the king's judges sometimes confessed themselves unequal to the emergency. In Y. B. 50 Ed. III, 6. 12, Cavendish C. J. declined flatly to inspect a lady, saying, 'There is not a man in England who can rightly adjudge her of age or under age. *Some women who are thirty years old will seem eighteen.*'

³ Y. B. 21 Hen. VII, 40, 58.

⁴ *Rot. Cur. Reg.*, ii. 189.

monly the assize being ready on the spot was asked to decide the point: while doing so it is not an assize, it is a *iurata*, *assisa vertitur in iuratam*.

A 'iurata' always implied the consent of the parties, and so could not be attainted for a false verdict, till 1275 when the law was altered¹. It was not permitted to reprobate the tribunal that one had chosen. A similar argument protected the recognitors in the Grand Assize in Bracton's time, for the party, it was said, had the choice of battle and so could not complain.

In the Assizes if there was neither consent nor order of court the exceptions had to be tried by battle, but the judges seem to have forced the *iurata* on the litigants, and in all new forms of action not covered by established rules trial by jury was the recognized mode². The Statute 15 Hen. VI, c. 5 recites that this method is now general in cases touching life and death, lands and tenements, goods and chattels of every one of the king's subjects.

If a man put himself on his 'country,' the country was represented by persons who were likely to know the facts³. These persons came *de vicineto*, for as Littleton says 'vicinus facta vicini praesumitur scire,' though in time the requirement of vicinage was satisfied if some came from the hundred to inform the rest, or, as Fortescue⁴ says, to enable the rest to judge of the *credibility of the witnesses*. The number of necessary hundredors, which in the reign of Ed. III was *six*, was in the time of Fortescue reduced to *four*. The Stat.

¹ Stat. of West. I, c. 38.

² See Stat. Walliae, c. xi.

³ The parties might 'put themselves' on one man who knew the facts: as in the case where a defendant asserted that the plaintiff 'assigned' him to pay money to the Earl of Oxford. The plaintiff denied this, and *et se de hoc ponit super ipsum comitem*. The defendant does the like. A writ is sent to the Earl, who comes and says the assignment was made (*Rot. Cur. Reg.*, No. 140; Pasch. 34 Hen. III, m. 17).

⁴ c. 26.

35 Hen. VIII, c. 6 restored the number of six, a provision soon virtually repealed by Stat. 27 Eliz. c. 6, which required only *two*. At length, by Stat. 4 & 5 Anne, c. 16, the requirement was abolished in civil cases, it being sufficient if the jury came from the body of the county at large¹.

If the ‘patria’ did not know of itself, it was expected to collect evidence, and certify itself, as the writ said ‘se inde certificent,’ and it was allowed about a fortnight for doing it². But it is not known when the witnesses first make their formal appearance in court.

Charters and writings were from the first shown to the jury. If a plaintiff produced a writing under seal properly attested by witnesses, and the writing was denied, he put himself, according to Bracton, ‘super patriam et testes in carta nominatos.’ The sheriff then summoned the testes and the twelve milites ‘ad recognoscendum.’ If the witnesses were dead or out of the realm, he put himself ‘super patriam.’ Bracton mentions that the party could prove his deed by similarity of impression of the seal. If the ‘testes’ came the jurors questioned them, and the court questioned them all, sometimes separately, in order to get the best information³.

It was apparently improper for a jury specifically to find matter of record without evidence⁴, or a deed⁵ unless produced, because if it had been produced to the other side, it might perhaps have been avoided on the ground of insanity or minority or some other defect.

Chal-
lenging
of Wit-
nesses and
Jurors.

Documentary evidence apart, it seems that *temp. Edward III* a distinction is appearing, in that witnesses cannot be challenged, while jurors can, and that while the jurors are sworn

¹ Blackstone, iii. 360.

² Britton, ii. 87.

³ Pl. Abb. 331, col. 1.

⁴ Y. B. 14 Ed. III, 25 sq., and Introd. xxxvii–xl (Rolls Series).

⁵ Y. B. 7 Hen. V, 5, pl. 3.

to tell the truth to the best of their knowledge, ‘secundum credulitatem,’ the witnesses are sworn to tell the truth simply, for they ought to say nothing that they do not know for certain. This distinction, which is highly significant, was known to the Law Merchant as early as the fourteenth century¹. The Law Merchant indeed seems to have been far in advance of the Common Law in these matters.

By the time of Henry VI we find Fortescue, the chancellor, describing trial by jury in a civil action, as a trial by evidence, ‘each of the parties by themselves or their counsel, in the presence of the court shall declare and lay open to the jury all and singular the matter and evidence whereby they think they may be able to inform the court concerning the truth of the point in question. That each of the parties has a liberty to produce before the court all such witnesses as they please or can get to appear on their behalf, who, being charged on their oaths, shall give any evidence that they know touching the truth of the fact concerning which the parties are at issue².’

It is curious to find that about the same time the judges were expressing the view that if *A* volunteers evidence to show the truth to *B* he is guilty of maintenance; he must be asked for his evidence unless he has some interest in the case³. In consequence people asked for a subpoena to be sent to them which should protect them⁴.

This may have helped to prevent oral testimony from being given in court; and there are indications that as compared with the jury the witnesses are comparatively unimportant. So in 1499, where a jury separated without leave in a storm and talked to a friend of one of the parties, the court said that it was immaterial, for evidence was only given to inform

¹ App. 3. *The Little Red Book of Bristol*, c. vi.

² *De Laud. Leg. Ang.*, c. xxvi.

³ Cf. Y. B. 28 Hen. VI, 6. 1.

⁴ Cal. Proc. Ch., i. 19.

their consciences, and if no evidence were given yet the jury must give a verdict¹.

In 1562² the right was first given to have process against all sorts of witnesses, which indicates that the practice of examining witnesses before the jury has become general.

It was regarded as the right of the parties to give information to the jury after impanelling and before trial³, and at first the parties could talk to the jury after they had retired, but in the last half of the fourteenth century this practice and that of giving new documents to the jury after retirement was discouraged by fine and imprisonment, and in 1481⁴ we find Brian C. J. delivering to the jury all the material evidence, but what was not material he would not allow to be delivered. But in *Bushel's* case, in 1670⁵, it seems to have been recognized that a jury might act on its private knowledge, even of documents not known to the parties.

By Stat. 14 & 15 Vict. c. 99 the parties to a civil action became for the first time competent witnesses.

Unanimity was not at first necessary. According to Fleta if a civil jury disagreed they might be afforced, or compelled by starvation to find a verdict, or the judge might take a majority verdict, *ex dicto maioris partis iuratorum*, but in the second half of the fourteenth century the rule appears that twelve must agree⁶.

The number of the early juries does not seem to have been fixed. Perhaps Henry's recognitions established twelve as the proper number, but this is uncertain.

¹ Y. B. 14 Hen. VII, 29. 4.

² By 5 Eliz., c. 9, § 6.

³ See 6 Hen. VI, c. 2, as to the sheriffs furnishing the parties with a copy of the pannel.

⁴ Y. B. 21 Ed. IV, 38. 1.

⁵ Vaugh. 135, 149.

⁶ Y. B. 41 Ed. III, 31, 36; s. c. 41 Ass. 11.

At the present day the general rule is that fact is for the jury, law for the judge. The old popular courts declared the custom and found the facts. But in the fourth year of John a jury says that *non pertinet ad eos de iure discernere*¹. This distinction is found in the second book of the Decretals, where the direction is, that if the facts are admitted, the question is for the judge alone, if the facts are not admitted, they must be proved by witnesses and not by ordeal or duel.

Although the County Court and the County Court jury are institutions well known at the present day, they have no connexion with the old local courts of the eleventh century. The local courts that survived are either held in chartered towns, as the Passage Court of Liverpool and the Chancellor's Court in Oxford, or are Courts of Request founded on statute.

The modern County Court.

The modern County Court is the creature of statute. The first County Court Act was passed in 1846, and divided the country into circuits, each with a Court of Record, which had jurisdiction, up to a certain amount, and in specified classes of case. Subsequent statutes have extended these limits, and further extension may well be expected. The judge is appointed, and is removable, by the Lord Chancellor. He sits either alone or with a jury of five, and from him on a question of law raised at the trial, an appeal lies to the High Court².

¹ Pl. Abbrev., 40 Linc., 4 John.

² 51 & 52 Vict. c. 43.

CHAPTER XXIV

THE CLERK

ALTHOUGH the custom of the King's Court became the Common Law of the land, there were three classes of persons who were in a varying degree exempt from it—the Clerk, the Jew, and the Merchant.

Before the Norman Conquest, the law of the National Church consisted of a body of canonical law that contained the Scriptures, the Creeds, and the canons of General Councils which were recognized as authoritative in the whole Western Church, and secondly the decrees of National Councils, manuals of discipline known as ‘Penitentials,’ some foreign canons, and the legislation of Christian kings. The union between Church and State was complete and entire.

The proper court of the Church was the Court of the Bishop : his jurisdiction was personal and could be exercised anywhere, *in camera* or *in itinere*, and the bishop's executive officer was the archdeacon. The bishop was also a secular lord, and had a recognized place in the courts of the Hundred, the Shire, and the Witan. In these secular courts, it is supposed¹ that offences of a mixed character were tried which were liable to both civil and ecclesiastical penalties, such as adultery and detention of tithe. The procedure is assumed to have been ordinary, viz. by ordeal and compurgation. The Metropolitan authority of the archbishop was recognized by the bishops.

¹ *Report of the Ecclesiastical Courts Commission*, 1883.

Provincial synods were from time to time summoned, and were attended by the clergy, and sometimes by the king and the lay lords. In them canons were passed, and occasionally bishops were removed from their sees. It is very doubtful if there was any appeal to a superior court secular or religious at that time, and no traces have been discovered of appeals to Rome.

The Conqueror as in secular so in ecclesiastical matters imposed no new code of law. His activity was directed rather to the proper administration of the laws civil and religious, than to new legislation which in matters ecclesiastical was always carefully watched by the crown. The Canon Law was still the traditional law of the Church, which was always liable to be altered by the Decretals of the popes, which were the statute law of the Church¹.

The
Canon
Law.

¹ There have been two views held as to the authority of the Canon Law of Rome in the Ecclesiastical Courts of this country. *The Report of the Ecclesiastical Courts Commission*, 1883, gave support to the view that though the Canon Law was of great authority and entitled to respectful consideration, yet it was not binding. On the other side Professor Maitland, in his *Canon Law in the Church of England*, firmly maintained that the Canon Law of Rome was in the Courts Christian of this country regarded as absolutely binding.

But inasmuch as the late Bishop of Oxford, who drew the Commissioners' Report, intimated to me sometime before his death that he was not prepared to dissent from Professor Maitland's view, that view must be considered for the present as authoritative. It is put briefly as follows.

The *Decretum Gratiani* was the text-book of the old Church law, but in 1234 it was out of date. Three popes, Gregory IX, Boniface VIII, and John XXII, issued three collections of Decretals, each of which was a statute-book for the whole Catholic Church, and as such binding.

Professor Maitland calls as his chief witness William Lyndwood, the great English Canon lawyer, and the principal official or judge of the Archbishop of Canterbury : he wrote a commentary for beginners on the archiepiscopal constitutions of Canterbury. In this he never suggests that the Decretals are other than law, and that though their meaning be doubtful they are not binding, and he explicitly states that

Effect of William's edict.

The Church Courts.

The edict of William which severed the civil and spiritual courts was pregnant with far-reaching results, but its immediate effect was to develop the machinery of ecclesiastical judicature. The tribunal was no longer of a mixed character, the laity were no longer united with the clergy. Dioceses were divided into archidiaconal districts, and a regular system of appeal was instituted. This activity first manifested itself in the vigorous growth of the Archdeacon's Court, which within fifty years had usurped a customary jurisdiction which began seriously to rival that of the Bishop. To meet this competition the bishops created Officials, Chancellors and Commissaries, trained experts whose duty was to represent the bishop in his court. This delegation did not prevent the bishop from sitting himself were he so minded¹, and these offices though strictly tenable during the bishop's pleasure became by usage life appointments.

the Pope is above both a general Council and the law, and that to dispute the authority of a Decretal is heresy. Obstinate heretics, he adds, are to be burnt.

In contrast with the Pope, an archbishop can make statutes or constitutions for his province, either of a declaratory or supplementary nature, but such ordinances cannot derogate from the Decretals. If they are contrary to the Decretals they are *ultra vires*, and at any rate they may be upset by a future Decretal. As might be expected the archiepiscopal constitutions did not contain anything of great importance. Not only was the pope superior to the archbishop, but so was the legate *a latere*; hence Lyndwood makes the following list in order of authority: (i) Decretals, (ii) legatine constitutions, (iii) provincial constitutions, provided they do not contravene the other two.

Though the king and the king's courts could and did restrict the area of activity for the Church Courts as by writs of prohibition, yet within the permitted limits the Church could cultivate its own garden in its own way, nor was there any claim to dictate to the Church Courts what judgements should be given. When the Church took the position that subsequent marriage legitimated offspring born before marriage, the King's Court declined to recognize the church view so far as it affected the law of inheritance, but for the purposes of ordination permitted an illegitimate person to take orders with a dispensation.

¹ See *R. v. Tristram*, 1902, 1 K. B. 816 (C. A.).

From the Archdeacon's Court appeal lay to the Bishop, from the Bishop to the Archbishop, and according to foreign custom thence to the Pope. But the Pope was not merely the ultimate court of appeal, he was an omni-competent court of first instance for the whole of Christendom, 'dominus papa iudex est ordinarius singulorum'¹, and he could and did delegate his jurisdiction either generally or in particular cases; and in this country his delegates would be English ecclesiastics appointed by the papal rescript. In such a case the plaintiff applied to the pope for a writ or *breve* just as in a secular matter he went to the king's chancery. Popes also appointed resident legates to represent them, and when this step was objected to by the kings, clothed the Archbishop of Canterbury with legatine authority which had the effect of making it quite uncertain in which capacity, metropolitan or legatine, the archbishop on any occasion was acting. Appeals to Rome were regarded by the kings with disfavour. The Constitutions of Clarendon² provided that appeals from the archbishop should lie to the King's Court for failure of justice, but the panic which attacked Henry after the murder of Becket made the provision a dead letter, and appeals to Rome went on as before. Henry III and Edward I both forbade their subjects to be cited out of the realm, statutes of *praemunire* penalized the practice, but appeals continued, till the Reformation, in those matters which lay outside the cognizance of the secular courts, viz. in testamentary and matrimonial causes.

The ecclesiastical system in its complete form was as follows. The kingdom was divided into provinces, provinces into dioceses, dioceses into archdeaconries, archdeaconries into rural deaneries, and there were besides 'peculiars' belonging to the crown, the archbishops, bishops, deans, chapters, and prebendaries. Proper courts corresponded with

The jurisdiction of the Pope.

¹ And see Bracton, f. 412.

² Cap. viii.

these divisions, provincial, diocesan, archidiaconal, ruridecanal, and peculiar.

The Archbishop's Courts.

The provincial courts of the archbishop were essentially the same in both provinces. There were four in Canterbury, and two in York. In Canterbury they were, the Court of the Official Principal or the Court of Arches, the Court of Audience, the Prerogative Court (till 1857), and the Court of the Archbishop's Peculiars. In York they were the Chancery Court, and (till 1857) the Prerogative Court.

The Court of the Official Principal or the Court of Arches was the consistory of the archbishop, the court of appeal from the diocesan courts of the province, and also a court of first instance in all ecclesiastical matters. The judge was the Official Principal, he held all the judicial powers of the archbishop and stood in relation to him as the Chief Justice did to the king, process issuing in his name. He also has the style of 'Dean of Arches': originally the Dean held a subordinate position, and then the two offices were merged.

The Court of Audience was the court in which such personal jurisdiction of the archbishop was exercised as was not exhausted by the appointment of the Official Principal. It is said to have had co-ordinate authority, and process issued in the name of the archbishop. It has been suggested that perhaps the foundation of this jurisdiction was legatine. It was presided over by the Archbishop in person or by his Vicar-General.

The Prerogative Court took the testamentary and matrimonial business. If the Official Principal did not sit, another judge took his place with the style of Master, Keeper, or Commissary.

The Court of Peculiars was a branch or an aspect of the Court of Arches, exercising jurisdiction originally over the thirteen London parishes which are exempt from the jurisdiction of the Bishop of London.

In the province of York the Chancery Court corresponds to the Court of Arches, the Prerogative Court to the court of the same name in Canterbury.

The Diocesan Court was the consistory court of the bishop, and was held by the bishop's Chancellor, or Official Principal. It took all ecclesiastical causes arising in the diocese. If the see was vacant, the archbishop through the vicar-general of the province presided.

The
Bishop's
Court.

The Archdeacon's Court originated in the functions of the archdeacon, which were at first purely executive. It was his duty to hold visitations in his district, inquiring, amongst other matters, into the condition of church fabric and church furniture.

The Arch-
deacon's
Court.

But by degrees the Archdeacons built up a customary jurisdiction of a more extended character depending partly on usurpation, partly on varying agreements made with the bishops. The ruridecanal court which was not strictly judicial, but was held preparatory to the visitation of the archdeacon, has become obsolete.

The bishop's visitations gave an opportunity for hearing complaints of or by the clergy, and for correcting abuses so presented according to the methods prescribed in the 'Penitentials,' and thus became an effective part of the episcopal and archidiaconal jurisdiction.

The procedure for over three centuries before the Reformation followed the forms of the Roman Civil Law.

The Extent of the Spiritual Jurisdiction.

When the lay and spiritual courts became distinct, the Church claimed jurisdiction in two great classes of case : (1) where a clerk was accused of felony ; (2) where the matter was of a spiritual nature.

The claim of the Church to try its felonious clerks pro-

duced an extraordinary condition in the English criminal law and is discussed in the following chapter.

Matters of spiritual nature. The matters which the Church declared to be of a spiritual nature were numerous, and some of its claims have also had momentous effects on our law, for to them is directly due the difference in the devolution of real and personal property.

The Church courts assumed jurisdiction, with respect to churches, over patronage, furniture, ritual, and revenues ; with respect to the clergy, over faith, practice, dress, and behaviour in or out of church ; with respect to the laity, over morality, religious behaviour, marriages, legitimacy, wills, and administration of intestate estates. They also concerned themselves with the maintenance of doctrine, and claimed to examine into contracts where faith was alleged to have been pledged and broken, into oaths, promises, and fiduciary undertakings¹.

Suits about ecclesiastical property were always, with the exception of advowsons, claimed by the secular courts : and advowson suits were reclaimed by Henry II by the Assize of Darrein Presentment and were thereafter tried in the King's Court². The King's Courts never interfered in church services, church administration, or the distribution of church revenues.

The executor. The testamentary and intestate business fell into the ecclesiastical hands in the twelfth and thirteenth centuries.

¹ In a book, now rarely to be bought, by Archdeacon Hale containing precedents of criminal cases in the Consistory Court of London (1480-1639) we find *inter alia* the following topics dealt with: fornication, adultery, incest, bigamy, rape, sorcery, unseemly demeanour in church, absence from church, the marital relations, haunting taverns and keeping bad company, defamation, tale-bearing, administering goods without the ordinary's authority, destroying parish boundaries, practising as surgeon or midwife without licence, vexatious prosecution, not living in charity, and fox-hunting and fowling on Sundays.

² *Constitutions of Clarendon*, cap. i.

As freeholds could not be devised by will, the jurisdiction was restricted to chattel interests, and the competence of the church courts to compel the executor to carry out the testator's directions was conceded by the king's courts without difficulty and was firmly established before Glanvill wrote. The administration of intestate estates is closely connected with testamentary business, and naturally accompanied the testamentary jurisdiction.

The matrimonial jurisdiction rested on the sacramental and religious character of the ordinance, and was undisputed.

No objection was ever raised to the Church's jurisdiction over ecclesiastical offences committed by the clergy. With regard to the laity the Church claimed the correction of sinners for their souls' health (*pro salute animae*). So far as it dealt with such immorality as was untouched by the State, the claim was not seriously attacked before the Reformation. At the present day, indeed, it seems that if in England incest is punishable at all, it is only so in the ecclesiastical courts. But the pretensions of the Church under this head included the cognizance of breach of contract, perjury, and slander, where civil remedies coexisted. These claims were maintained till the Reformation and were regarded with much jealousy¹. The jurisdiction was exercised under the visitatorial and penitential system, or on express complaint, the penalties imposed being penitential, but commutable for a money payment. The efforts of the crown were directed mainly to restricting appeals which were vexatiously multiplied, and limiting the area of the jurisdiction.

The grave offence of heresy was in the fourteenth century Heresy. a novelty; and if we except the case of the unlucky deacon mentioned by Bracton, it seems that no penalty beyond excommunication could be enforced. But the canonists of the thirteenth and fourteenth centuries took their views of

¹ *Constitutions of Clarendon*, cap. xv.

heresy from the Theodosian Code, which punished people such as Manichaeans with death, and they contended that the ecclesiastical courts could convict for heresy and that the civil power was bound to act as executioner. The common lawyers however stoutly resisted this encroachment. Accordingly, in 1382, the clergy having found their spiritual weapons inefficient, resorted to an unparalleled and instructive expedient. They forged an Act of Parliament, 5 Ric. II, st. 2, c. 5, directing the sheriffs, on the certificate of the prelates, to hold 'in arrest and strong prison' heretics, till they conformed. Next Session the Commons preferred a Bill stating that they had never assented to this Act, and desiring that it should be declared void. The Royal Assent was given, but the clergy so managed that this Act of Repeal was never published nor printed with the Acts of Parliament. It is now printed 3 Rot. Parl., p. 141, no. 53.

The writ
'de heretico com-
burendo.'

On February 26, 1400, the king, *the temporal lords assenting*, issued a writ¹ for burning one William Sawtre, who had been convicted by the Provincial Council of Canterbury as a relapsed heretic.

On March 10, 1400, the Statute 2 Hen. IV, c. 15, was passed, directing that obstinate and relapsed heretics should be burnt. This being the position, the church party maintained that it proved the existence of a writ *de heretico comburendo* at common law. If such a writ existed, it is curious that it was never used, and if it was usual, the assent of the temporal lords was not required for its issue.

The Statute of Henry IV was reinforced by a severer statute in 1414², and under it people were examined, punished, and burnt freely down to 1539, when the Act of the Six Articles³ was passed, defining heresy and punishing it with burning, imprisonment, and execution as a felon.

¹ 3 Rot. Parl., p. 459 *a.*

² 2 Hen. V, c. 7.

³ 31 Hen. VIII, c. 14.

On the accession of Edward VI these statutes were repealed and the common law restored, but with the construction added, that the writ *de heretico comburendo* existed at common law, and issued after conviction by a Provincial Council.

Mary re-enacted these statutes, Elizabeth repealed them, but established the Court of High Commission. Practically the statute by its wording took no account of any one but Anabaptists, i. e. Unitarians. These 'wretches abhorred in the eyes of all orthodox Anglicans' were tried and burnt under this supposed common law writ, the last execution of the kind occurring in 1612¹.

In 1640 the ecclesiastical courts fell, in 1661 the ordinary ecclesiastical courts were revived, but deprived of the *ex officio* oath, and the law of heresy fell into a state of obscurity. In 1677 the writ *de heretico comburendo* was abolished by 29 Car. II, c. 9, the clergy being only permitted the use of excommunication, deprivation, degradation, and other ecclesiastical censures.

'As a mere matter of legal theory,' says Mr. Justice Stephen, 'I know of no reason why any layman who is guilty of atheism, blasphemy, heresy, schism, or any other damnable doctrine or opinion should not be prosecuted in an ecclesiastical court and have penance enjoined, e. g. the public recantation of his opinions, and, on refusal, excommunication, and the court on that might direct imprisonment for not more than six months²'.

The Reformation Period.

The Reformation marked a great change. The Church was now expected to enforce and did enforce the Statutes of Parliament. The Canon law was permitted only in so far as it was not repugnant to the Laws of the Land.

¹ 10 Jac. I.

² Stephen, *History of the Criminal Law*, ii. 468.

Legisla-
tion of
Hen.
VIII.

By the Statute of Citations¹ Henry forbade the citation by the Provincial Court of persons resident in the dioceses of the suffragans, and thus stopped the direct jurisdiction of the archbishop, which was perhaps of legatine character, or was perhaps claimed by the archbishop over his province in humble imitation of the pope's 'ordinary' jurisdiction of first instance over Christendom.

The Statute of Appeals² forbade appeals to Rome: they went no further than the Court of the Archbishop.

The Act for the Submission of the Clergy³ disallowed any new canons made without the Royal authority. The old canons were to be revised; till revision, all canons not repugnant to the law and the royal prerogative were to stand. The immediate result of this was the desuetude of the canon law, the universities ceasing to give degrees in it as a separate faculty. Not more than seven or eight persons after that period graduated at Oxford in canon law, and then under the description of Doctors Utriusque Iuris. A further appeal was allowed from the archbishop to the King in Chancery: this Court thus took the place of the pope, and was popularly known as the Court of Delegates.

By the Statute of Supremacy⁴ almost unlimited powers of ecclesiastical jurisdiction were assumed, and under it, a commission, of which no copy exists, was issued to Cromwell as Vicar-General and Vicegerent with large powers of visitation which he used vigorously, and which afterwards served as a precedent for the establishment of the Court of High Commission. The old tribunals remained, 'but the supreme judicature of the king exercised through special commissions of visitation and jurisdiction, and the obligation under which the bishops or some of them placed themselves by taking out commissions for the exercise of

¹ 23 Hen. VIII, c. 9.

³ 25 Hen. VIII, c. 19.

² 24 Hen. VIII, c. 12.

⁴ 26 Hen. VIII. c. 1.

their ordinary jurisdiction, paralyzed the working of the ancient courts^{1.}

The reign of Mary was retrogressive and episodical. The accession of her sister is of importance, ‘the statutes passed in the first Parliament of Elizabeth for their comprehensive as well as their permanent character, embracing the whole subject of the ecclesiastical constitution and remaining in all but one important matter practically in force until the present century.’

The Royal jurisdiction in matters ecclesiastical was immediately restored. The Act of Uniformity² while providing process before lay tribunals recognized and confirmed the power of the Ordinary to reform, correct, and punish by censures of the Church all offenders against the provisions of the Act. The joint effect of the Marian and Elizabethan legislation was that the authority under which the ordinary courts were held was that of the archbishops, bishops, and ordinaries.

As the canon law had never been revised, it remained in force so far as it was not contrary to the law or the royal prerogative, and such canons and the king’s ecclesiastical laws were concurrently administered by the ecclesiastical courts. To this body of law were added, canons made in convocation with royal sanction, royal proclamations, injunctions, and advertisements issued in virtue of the supremacy or under the Act of Uniformity.

The law
of the
Church.

The ecclesiastical jurisdiction of Elizabeth was exercised by :

1. The old courts administering the ancient law modified as above stated.
2. The Court of High Commission^{3.}
3. The Court of Delegates^{4.}

¹ *Report of Ecclesiastical Commission*, xxxiii. sq.

² 1 Eliz. c. 1.

³ Created under 1 Eliz. c. 1, § 18.

⁴ 25 Hen. VIII, c. 19.

In *Whiston's* case¹ the right of Convocation to exercise jurisdiction by examining, censuring, and condemning heretical tenets and the authors and maintainers of them, was affirmed by eight judges to four. But these expressions were extra-judicial, and the better opinion seems to be that the power of Convocation to condemn a heretical work is as well established as its incompetence to try a clerk for heresy².

The Court of High Commission.

By 1 Eliz. c. 1 the Crown was empowered to issue commissions for the purpose of correcting all manner of errors, heresies, schisms, abuses, offences, contempts, and enormities. Under the statute temporary commissions were at various times appointed. One issued on June 24, 1559, for the dioceses of York, Chester, Durham, and Carlisle, and five altogether issued during the first twenty-five years of Elizabeth's reign.

In 1583 a permanent Court was established of forty-four persons, twelve being bishops, and three making a quorum. Under the general words of the statute it exercised almost despotic powers of fining and imprisoning, even for offences of by no means spiritual cognizance. It was as arbitrary as any lay court, as inquisitorial as any ecclesiastical court. It only differed from the Roman Inquisition in having no power to kill or torture. It was for suitors a court of first instance, and was open to informers of every class, it proceeded on suspicion, information, presentation, or inquiry, and except for a short time under James I, it was subject to no appeal. It did not, however, supersede the courts of the ordinary, but exercised concurrent jurisdiction. While there is sufficient evidence of jurisdiction exercised by it in doctrinal and disciplinary matters, the largest proportion of offences comes under the head of misconduct and immorality, both

¹ 15 *State Trials*, 703.

² Phillimore, *Ecclesiastical Law*, p. 1961.

of clergy and laity, and of proceedings in recusancy and nonconformity. The *ex officio* oath was largely used and twenty-four interrogatories of the most stringent type were drawn up and were administered to every 'suspect' clergyman. Not only his public proceedings but his private conversation was investigated. If he declined the *ex officio* oath, he was deprived and imprisoned for contempt.

The Court was abolished by 16 Car. I, c. 11, and any new Commission forbidden by 13 Car. II, c. 12. Nevertheless James II tried to revive it under the name of the 'Court of Commissioners for Ecclesiastical Causes': it was to consist of three clerics and four laymen, and Jeffreys was to preside. But James' reign came to a sudden end, and his attempt was declared illegal by the Bill of Rights.

The Court of Delegates.

The powers of this Court were full and final: it carried the full judicial authority of the crown, and from it there was no appeal. But the Elizabethan lawyers held that in virtue of the supremacy, there remained in the crown the power of rehearing the whole case *de novo* by a Commission of Review, issuing on a petition to the King in Council.

The Delegates could not hear appeals from the Court of High Commission, but from the ordinary courts could take appeals on all matters, cognizable therein, with the possible exception of heresy.

The Delegates were to be 'such persons as shall be named by the king's highness.' Doctors of the civil law were always employed in conjunction with bishops or judges. The bench was made up from a rota of D.C.L.'s and the common law puisne judges. The original commission was filled by three common law judges, three senior and three junior D.C.L.'s, taken in order, beginning at both ends of the list. If sentence was to be pronounced one common law judge must concur.

Its composition

'The judges in the Court of Delegates did not publicly assign the reasons of their sentence, but in deliberating on their judgement they assigned their reasons to each other and in the presence of the registrar.'

In 1830 this court was made the subject of a Royal Commission which reported in 1832. No substantial charge of injustice or excess of powers could be laid against it, though its proceedings were somewhat expensive and dilatory. 'We are informed that it seldom reversed the judgements of the Provincial Courts, that it was so far as the civilian element went frequently composed of junior and inexperienced Doctors, that its proceedings were undignified, especially the mode of payment (a guinea a day paid by the victorious party at the close of the cause to each of the judges). The fact, moreover, that the reasons for the judgements were not given seems to have been regarded as infusing an element of uncertainty as to the nature of the law administered by the court¹.' The learned witnesses who appeared before the Commission were, however, unable to suggest anything more satisfactory.

and abolition.

In consequence of the Report the Court was abolished for almost all purposes by 2 & 3 Will. IV, c. 92 (the exception being the recourse allowed to the Delegates by the patent of a Colonial Bishop).

By the same Act Commissions of Review were forbidden ; the powers of the Court of Delegates were transferred to the King in Council, and by 3 & 4 Will. IV, c. 41, went to the Judicial Committee of the Privy Council, further regulations being made by 3 & 4 Vict. c. 86, §§ 15, 16, and 6 & 7 Vict. c. 38.

Appellate Jurisdiction Act.

The Appellate Jurisdiction Act of 1876 restored to the Privy Council the jurisdiction which had for a time been

¹ *Report of Ecclesiastical Commission*, 1883.

menaced by the Judicature Act, 1873, and it was provided that a number of archbishops and bishops to be appointed by Order in Council (five being subsequently the number fixed upon), should sit as assessors to the Judicial Committee.

The powers of the Church courts have been considerably affected by legislation.

Jurisdiction of
Church
Courts.

In 1813, by 53 Geo. III, c. 127, excommunication was prohibited as a penalty for non-appearance on citation, or for contempt, irregularities which seem to have been incidental to cases of non-payment of church rates (see 3 & 4 Vict. c. 93). By 2 & 3 Will. IV, c. 93, provision was made that the orders of the courts should be enforced by sequestration.

By 18 & 19 Vict. c. 41, suits for defamation were abolished, and by 23 & 24 Vict. c. 32, ecclesiastical proceedings against laymen for brawling were similarly dealt with.

In the case of *Phillimore v. Machon*¹ it was held that since the passing of 4 Geo. IV, c. 76, the ecclesiastical jurisdiction in perjury had gone ; and that a statute giving jurisdiction to a temporal court in any matter, inferentially withdraws that matter from the cognizance of the ecclesiastical tribunals.

It should be observed that perjury in an ecclesiastical matter was properly cognizable in the spiritual courts. If it was a mere voluntary oath (*laesio fidei*) opinion fluctuated. The early view was that if the oath occurred in a spiritual matter, e. g. an oath to marry, that was for the ecclesiastical courts, but not if otherwise, e. g. an oath to pay money, for on that an action would lie at common law. The later opinion, *temp. Ed. IV*, was that in *laesio fidei* the spiritual court might punish *ex officio*, but not at the suit of the party.

Perjury ‘in a judicial proceeding,’ the only species now known to the criminal law, before the reign of Elizabeth

¹ L. R. 1 P. D. 481.

was recognized in the conduct, not of a witness, but of the jury who gave a false verdict, thus making themselves liable to an attaint. In Archdeacon Hale's book there are, however, some cases where the offence is perjury before arbitrators¹.

The
Church
Discipline
Act.

In 1840 the Church Discipline Act² was passed which completely changed the procedure in 'causes of correction.' The jurisdiction of the chancellor in the Consistory Court was swept away, and the bishop was required to sit there in person with his prescribed assessors, five in number, one being his vicar-general, or an archdeacon or rural dean of the diocese. But the action of this new tribunal was paralyzed by the power given to the bishop, of sending any case, at any time before articles were filed, by Letters of Request to the Court of Appeal of the Province, 'a power which has been so generally exercised as to make it difficult to say whether the tribunal has or has not been satisfactory.'

This act which restored the bishop's personal jurisdiction over clerks who had offended against the laws of the church or given rise to scandal, was agreeable to the Canon Law which says that to the Bishop belong 'inquisitio correctio punitio excessuum seu amotio a beneficio³'.

The Public
Worship
Regulation
Act.

In 1874 the Public Worship Regulation Act⁴ was passed giving an alternative procedure in case of offences against the ceremonial law of the church. It provided for hearing by a 'judge,' appointed as below, of 'representations' of alleged infringements of the ceremonial law. The 'representation' must be made to the bishop by the archdeacon, a churchwarden, or three aggrieved parishioners, in the manner prescribed in the Act.

If the bishop thinks that proceedings should be taken, he

¹ lxx. 5, 18.

² 3 & 4 Vict. c. 86.

³ The Dean of Arches is not affected by the canon forbidding a chancellor to pronounce sentence of deprivation without the presence of a bishop.

⁴ 37 & 38 Vict. c. 85.

invites the parties to submit to his direction without appeal, and, on submission, deals with the matter himself. If they decline he sends his representation on to the archbishop who requires the 'judge,' who must be a barrister of ten years standing, or an ex-judge of the High Court, and a member of the Church of England, to hear the case. The appointment of this judge is vested in the two archbishops, his tenure is during good behaviour, and he is judge of the Provincial Courts of Canterbury and York. The same person shall be *ex officio* Official Principal of the Arches Court of Canterbury, and of the Chancery Court of York¹. From him appeal lies to the Queen in Council.

This Act does not seem to have given any powers for the repression of offences which were not comprehended in those conferred by the Church Discipline Act, and 'there is no reason to suppose that any saving of time and expense is effected by the substitution of proceedings under the later for those under the earlier Act.'

Under neither statute could any proceedings be taken without the sanction of the bishop of the diocese: and both allowed him absolute discretion as to giving his sanction. Under the former Act he need not even hear the parties², nor is he bound to give any reasons for his course: under the later Act if he refuses his sanction, he must state his reasons in writing, deposit the statement in the diocesan registry and send copies to the complainants and to the clerk complained of. Under the former Act complaints may be made by any one, under the later only by those who are by reason of residence or official position directly affected. Under the former Act, the judge could issue a monition and enforce it by suspension, but not by deprivation; under the latter, a vacancy is made automatically on inhibition after monition, should such inhibition remain in force for three years (no

The two
Acts com-
pared.

¹ 37 & 38 Vict. c. 85, § 7. ² *Ex parte Edwards*, 9 Ch. App. 138.

relaxation occurring till obedience is promised in writing), or should a second inhibition be issued on the same monition within three years of relaxation.

The
Clergy
Discipline
Act, 1892.

In 1892 a further change was made by the Clergy Discipline Act¹, which provided that if a clergyman be convicted of treason, felony, misdemeanour on indictment, or be sentenced to hard labour or any greater punishment, or has a bastardy order made against him, or is found in a divorce or matrimonial cause to have committed adultery, or has an order for judicial separation, or a separation under the Matrimonial Causes Act, 1878, made against him, then within twenty-one days of a conclusive finding, the bishop shall declare the preferment empty, and the clergyman becomes incapable of holding preferment unless he obtains a free pardon. If the bishop will not act, the archbishop shall.

Complaints against clergymen for immorality shall be heard in the Consistory Court before the chancellor of the diocese and, if either party desire, five assessors. The chancellor determines questions of law, questions of fact are found by the unanimous decision of the assessors chosen in the way prescribed in the Act, or by the chancellor and at least a majority of the assessors.

The bishop may, if he think the charges too vague and frivolous, disallow the prosecution.

The prosecutor may be any parishioner, the bishop, or any person appointed by the bishop.

Appeal at the option of the appellant may be to the Provincial Court or to the Queen in Council, but if to the Provincial Court its decision is final.

On conviction the clergyman may be deprived or suspended, and if the preferment becomes vacant he may be deposed by the bishop from holy orders.

¹ 55 & 56 Vict. c. 32.

Questions of doctrine and ritual are excluded from the purview of the Act, but with respect to any proceedings instituted for an offence for which a clergyman can be prosecuted under the Act, the Church Discipline Act of 1840 is repealed, saving certain sections which are re-enacted, under which *inter alia* the bishop can pronounce sentence by consent without further proceedings, and is empowered to inhibit the party accused from performing the services of the church pending the investigation.

By the Benefices Act, 1898¹, the bishop may refuse to institute or admit a presentee to a benefice, on the ground amongst others, that he is unfit by reason of physical or mental infirmity, serious pecuniary embarrassment, grave misconduct or neglect of duty in an ecclesiastical office, evil life, or having by his conduct caused grave scandal concerning his moral character, since his ordination. From his refusal, appeal lies to the archbishop of the province sitting with a judge of the Supreme Court, nominated by the Lord Chancellor from time to time, for the purposes of the Act. The judge shall decide all questions of law, and find as to any fact alleged as reason of unfitness or disqualification, and his decision thereon shall be binding on the archbishop, who shall thereupon,

(1) if the judge finds that no such fact sufficient in law exists, direct institution or admission, or,

(2) if the judge finds that any such fact sufficient in law exists, decide if necessary, whether by reason thereof the presentee is unfit for the discharge of the duties of the benefice, and determine whether institution or admission ought under the circumstances to be refused.

And in either case the archbishop shall give judgement accordingly, and that judgement shall be final.

¹ 61 & 62 Vict. c. 48.

CHAPTER XXV

THE CLERK (CONTINUED)

The crimi-
nous
clerk. It was said in a previous chapter that on the severance of the civil and spiritual jurisdictions the Church claimed the right to try all cases in which a 'clerk' was accused. Although this expression is wide, *clericis rettati et accusati de quacunque re*¹, the claim, in fact, was only pressed with regard to 'felonies,' as the King reserved cases of high treason², while of smaller offences, 'misdemeanours,' the Church took no account, perhaps because they did not involve the consequences on conviction of death, mutilation, or escheat³.

This claim, which for a time was successfully made, produced some remarkable consequences in the sphere of the English Criminal Law.

It may be useful here to make two statements which I think are accurate. Down to the year 1826⁴ treason and all felonies, except petty larceny and mayhem, were punishable with death. All felonies, except *insidiatio viarum et depopulatio agrorum*⁵, were 'clergyable' unless taken out of the benefit by statute.

¹ *Constitutions of Clarendon*, c. 3.

² Hale, ii. 350; and cf. 25 Ed. III, st. 3 *de clero*.

³ This exemption of ecclesiastics from the secular jurisdiction did not originate in William's ordinance. It had been long the practice for men in orders when accused to clear themselves in a way not available for laymen, e.g. the corsnaed was reserved for them: and if they went to compurgation they had fellow priests for compurgators.

⁴ 7 & 8 Geo. IV, c. 26.

⁵ Hale, ii. 333.

The
earliest
practice.

The story of 'benefit of clergy' is not easy to tell, for the authorities are rather difficult to understand. But it seems hardly possible to doubt that the construction placed by Professor Maitland¹ on the famous third chapter of the *Constitutions of Clarendon* is correct. The accused clerk is to be summoned to the King's Court, thence he is sent to the Ecclesiastical Court, which, if he is convicted, will degrade him. He is then no longer a clerk, and he will be tried and punished in the King's Court as a layman. An official of the royal court will attend the Ecclesiastical Court to see that he does not escape. This view, which seems agreeable to the Canon Law, was opposed by Becket on the ground that by this procedure the man was punished twice over, which was unjust, 'nec enim Deus iudicat bis in idipsum²'.

The view of Becket, whatever we may think of it, would seem to have prevailed after his death. Its modification.

According to Bracton³, 'when a clerk of whatever order or dignity is taken for the death of a man or any other crime and imprisoned, and an application is made for him in the Court Christian by the ordinary' the prisoner must be immediately given up without any inquisition being taken. He must be kept in prison till he has duly purged himself, and if he fails to do so he shall be degraded.

Bracton lays it down that even in murder the king's justices could not try clerks till degraded, and as the King's Court could not degrade them, they must be handed over to the bishop. Degradation, he proceeds, is sufficient punishment, *quae est magna capitatis deminutio*; but in a case of apostasy, he says a man was degraded and *statim fuit igni*

¹ *Canon Law in the Church of England*, pp. 132 sq.

² Some ecclesiastics had been accused of various offences, including rape and murder. A canon had spoken ill of the king's Justiciary. They had been found guilty in the Court Christian, but the king thought this penalty inadequate, and desired a secular punishment.

³ Bracton, *De Cor.*, II, c. ix. p. 298.

*traditus per manum laicalem*¹. But no doubt this was in consideration of the more heinous character of the offence.

Canonical purgation proceeded as follows : the prisoner was tried before the bishop or his deputy and a jury of twelve clerks. The prisoner first swore to his innocence, and twelve compurgators swore that they believed him ; the evidence on oath was taken *but only on behalf of the prisoner*, the jury of clerks found their verdict on oath, and the prisoner was usually honourably acquitted. Should it happen that he was convicted, he might be degraded, or put to penance, whipped, or imprisoned, but the Church could not pronounce a sentence of blood.

The practice in cases of this nature underwent considerable change, but in the second stage of development it seems that if a clerk committed a murder, the sheriff arrested him. If his bishop desired he could demand him, in which case he was bound to keep him in custody, and to produce him *sub pena centum librarum* before the justices in eyre, when they next came. In the thirteenth century, the clergy complained that this practice kept them years in prison. When the justices at length come, the prisoner is produced and declines to answer, saying that he is a clerk, and the bishop's official demands him. He is handed over, and the justices have no further concern with him.

Secular
inter-
ference.

But late in Henry III's reign, and certainly early in Edward I's, the practice has changed. Sir Edward Coke attributed the change to a construction placed upon the Statute of Westminster I, c. 2, but the statute says nothing expressly on the subject, and perhaps it was appealed to, in order to confirm an existing practice. Whatever the authority

¹ This was the case of an unfortunate deacon 'qui se apostatavit pro quadam Iudea.' This was no doubt an aggravating circumstance, for Fleta, i. c. 35, regards connexion with a Jew or a Jewess as partaking of the nature of bestiality. That sort of person is to be buried alive.

was, the principle was now recognized, that the truth of the charge ought to be investigated by the country and not by a partial tribunal. Accordingly the twelve jurors and the four townships were summoned to say in what character (*qualis*) the prisoner was handed over to his bishop, i.e. guilty or not guilty. This process is not Trial in the proper sense of the word, for the prisoner was not called on to plead. It is an inquisition *ex officio*. And according to Hale¹ an inquisition might be taken on the question whether he was a clerk or no. The inquisition was taken after indictment, that being the moment at which the bishop's claim was usually made. If the inquisition pronounced him guilty, he was handed over to the bishop, but his goods and chattels were forfeited, and his lands seized into the hand of the king till the result of the trial in the Bishop's Court.

This method was, or was alleged to be, a great disadvantage to the prisoner, for in an inquisition *ex officio* he was unable to challenge the jury, and besides, he might possibly be acquitted of the felony if he put himself on the jury *de bono et malo*, and took his chance.

Accordingly in Henry VI's reign, on the ground that it was better for the prisoner to claim his clergy after conviction, he was usually directed to plead to the felony, and put himself on the country. He could thus challenge the jury, have a chance of acquittal, and if found guilty then claim his clergy.

If the clerk cleared himself in the Bishop's Court, he had restitution of his lands, of which the king in the meantime had been taking the profits. But with regard to his goods, a difference was made. If the prisoner claimed and got his clergy on arraignment, that is before conviction, as was the old practice, then if he made his purgation, he had a writ to the sheriff to restore his goods. If, however, he pleaded to the felony, which was the new practice, and stood his trial before

¹ Hale, *P. C.* ii. 377 sq.

the justices, and was convicted, his goods were forfeited irretrievably. The new practice inaugurated in tenderness for the prisoner's interests, undoubtedly benefited the royal revenue.

The justices, moreover, had a discretion ; they could hand the convicted clerk over *absque purgatione*, which meant that he was not to be allowed to make his purgation, but was imprisoned in the bishop's prison for life. In that case the king not only had his goods but the profits of his lands during his life.

Extension of privilege. The privilege was originally confined to those persons who had 'habitum et tonsuram clericalem,' but by the statute *De clero*¹ clerks, secular and religious, convicted before the secular justices of treason or felony *touching other persons than the king* or his royal majesty, were allowed the benefit. The expression 'secular clerk' included doorkeepers, readers, exorcists, and subdeacons, and then the courts gradually extended the rule to all who could read, although in the reign of Edward II we find that one Shardelowe, subsequently a judge, said 'literatura non facit clericum nisi habet sacram tonsuram'.² But by the time of Edward IV the court gave clergy, if the case was clergyable, even though the prisoner had no tonsure, if he could read, and though the ordinary refused him.³ This official seems to have sat regularly in court, and to have claimed his men 'of course'; he was, at first, the only judge of their competency when the reading test was introduced, but the court soon took the view that the ordinary was but the minister of the court, and if he happened to be absent, the court could give the prisoner his book and hear the man read, even though the ordinary had made a return *non legit*. It appears, though this point is rather obscure, that if a prisoner claimed his

¹ 25 Ed. III, st. 3.

² 26 Ass. 19; 20 Ed. II.

³ Y. B. 9 Ed. IV, 28 b.

clergy on arraignment and read, he went to prison, even if the ordinary did not claim him, but if he put himself on the country *de bono et malo*, and if after conviction the ordinary would not claim him, he was hanged¹. Women were excluded from the benefit till 4 W. & M. c. 9: so also was the ‘bigamus,’ that is, ‘one who hath married two wives or one widow.’ He was relieved from his unfortunate position by 1 Ed. VI. c. 12.

Henry VII took the benefit away from certain offences. Change in character. The distinction now becomes one between offences and not between offenders, and the list was further curtailed by Henry VIII.

The reading test² which once sifted out the clerks now let in the layman. The practice was for the court to refer the prisoner to the ordinary, who certified whether he could read, and if he could, he had the benefit. The reading test.

In 1487 by 4 Hen. VII, c. 13, every one convicted of a clergyable felony shall be branded on the brawn of the thumb with M if it is murder, with T if it is theft. If any claimed clergy a second time, he should be denied, if not actually in orders, or if he could not produce his letters of ordination or a certificate from the ordinary.

By 18 Eliz. c. 7 it was enacted that persons admitted to their clergy shall not be delivered to the ordinary (purgation having in the meantime been abolished), but after clergy allowed and burning in the hand shall be set at liberty; but the justice may, as further correction, imprison them for a period not exceeding one year. The burning was to inform the judge whether the prisoner had had his clergy before.

¹ 12 Ass. 15, 39; 27 id. 42.

² It became usual at some period to test a prisoner’s clerical powers by giving him Ps. LI, v. 1, to read and translate. A prudent and unlettered felon might establish his claim to benefit of clergy, by showing a parrot’s knowledge of this so-called ‘neck’ verse.

We have (preserved in Mr. Baildon's book) a charge delivered June 3, 1595, *in camera stellata* by the Lord Keeper to the

- Justices of the Peace living in or near London, 'devised by the Queen herself,' which states *inter alia* that benefit of clergy is not to be allowed more than once, nor in case where it is not allowable by law, 'for it is no piety but wicked pity.'

By 5 Anne, c. 6 the necessity for reading was abolished.

By 4 Geo. I, c. 11 larcenies might be punished with seven years' transportation instead of branding.

By 19 Geo. III, c. 74 branding was practically though not expressly abolished.

Abolition. By 7 & 8 Geo. IV, c. 28 benefit of clergy was abolished. So that, to quote Mr. Justice Stephen, at the beginning of the eighteenth century the position was:—

All felonies were either clergyable or not.

Every one charged with a clergyable felony could have benefit of clergy for the first offence, and clerks in orders had it for any number of offences.

The benefit gave immunity from capital punishment, but till 1779 the prisoner was branded, and sentenced besides to one year's imprisonment, or in a larceny to transportation for seven years.

The number of felonies at common law was small, and all with the exception of petty larceny (i. e. of goods value less than 12d.) and mayhem were punished with death.

So till 1487 any one who could read might commit any number of murders without any other penalty than that of being delivered to the ordinary to make purgation, unless he was delivered *absque purgatione*.

After 1487 any one who could read could commit murder once without any punishment except branding, and if a clerk in orders he could till 1547 commit any number of them without being branded more than once.

Connected with benefit of clergy was the law of Sanctuary. Every consecrated church was sanctuary. The malefactor who took refuge there could not be extracted, but it was the duty of the four neighbouring towns to beset the holy place and send for the coroner. He came, parleyed, and gave the criminal the choice of standing his trial or confessing and abjuring the realm. If he chose the latter he hastened in pilgrim's dress to the port assigned, and left under oath never to return. His lands escheated and his goods were forfeited. If he would do neither, the legal view was that he might after forty days be starved into submission¹.

Abjuration became obsolete, but various places came to be privileged and 'sanctuary men' were allowed to live there even under statutory regulations².

Sanctuary was abolished by 21 Jac. I, c. 28, but in defiance of the law lingered on for another century, and was a protection at any rate against the execution of civil process: for there is an Act 8 & 9 Will. III, c. 27, making it penal in sheriffs not to execute their writs in 'pretended privileged places' such as Whitefriars and the Savoy³.

¹ Pollock and Maitland, ii. 590. There is a picturesque case in *Rot. Cur. Reg.* i. 69, 95, where William Fitz Osbert, who was a troublesome character, had behaved very badly to his brother Robert, and, in the absence of Richard I, posed as a patriot leader in the City of London. On being deserted by his followers, he fled to the church of St. Mary le Bow, and went up the tower. The Justiciar, who, unfortunately for William, was archbishop, had no scruples, disregarded the sanctuary, ordered the tower to be set on fire, smoked William out, caught him, bad him tried by the Proceres, dragged him to Tyburn, and hanged him. But this conduct was considered unseemly even in an archbishop, and led to his retirement.

² See 27 Hen. VIII, c. 19; 32 Hen. VIII, c. 12.

³ Stephen, *H. C. L.* i. 491 sq.

CHAPTER XXVI

THE EARLY HISTORY OF THE LAW MERCHANT

THE materials necessary for a full account of the legal position of the merchant are unfortunately scanty. He did not much resort to the King's Courts, and the local records such as those of the Piepoudre Court of Bristol, the great western port of the kingdom, have most unfortunately been lost or destroyed.

Early
Mercan-
tile Law
was Inter-
national.

And yet by piecing together fragments of evidence collected here and there, we can arrive at an opinion to the effect that there was a definite body of mercantile law, slightly affected perhaps by local variations, which was recognized in this country and in the ports of Europe, and that it was administered there and here in Courts of similar character supported by the royal authority. It was really Law, and it was really International. The history of the law merchant in this country can shortly be stated. It was from the first administered in local and popular Courts of *mercatores et marinarii*¹, and was intimately connected with the King in Council. There is statutory recognition of this connexion in the Statute of the Staple². The Court of Admiralty after a struggle usurped the jurisdiction, the common law Courts in turn destroyed the Admiralty jurisdiction by repeated prohibitions, while the merchants, dissatisfied with the illiberal policy of the common lawyers,

¹ Cf. the case of the ship of Placentia (Cor. Reg. Trin. 18 Ed. II, rot. 18).

² 27 Ed. III, st. 2, c. 21.

might have resorted to the Courts of Chancery whose doctrines and practice were very similar to their own, had not Lord Mansfield appeared to create the mercantile law of this country.

The nature of the law merchant has been stated by the most eminent authorities. Lord Mansfield said ‘the maritime law is not the law of a particular country but the general law of nations¹,’ and ‘the law of merchants and the law of the land is the same².’ And other judges used similar language³.

The *lex mercatoria* interested two kinds of people, the *mercatores* and the *marinarii*. ‘As the roundness of the globe of the world,’ says Malynes, ‘is compounded of the Waters and the Earth, so this work of the Law Merchant cannot be compleat without the Sea Lawes⁴.’ As to what the sea laws were, there is I think no shadow of doubt. Amongst the collections of Dooms, and the Custumaries of maritime law,

¹ *Luke v. Lyde*, 2 Burr. 887.

² *Pillans v. Van Mierop*, 3 Burr. 1669.

³ ‘This custom of merchants is the general law of the kingdom, part of the common law, and therefore ought not to have been left to a jury after it had been already settled by judicial determination’ (per Foster J., *Edie v. E. I. C.*, 2 Burr. 1226). ‘The custom of merchants is part of the common law of this kingdom of which the judges ought to take notice, and if any doubt arise to them about their custom they may send for the merchants to know their custom, as they may send for the civilians to know their law’ (per Hobart C. J., *Vanheath v. Turner*, Winch. 24). ‘The law of merchants is *ius gentium*, and the judges are bound to take notice of it’ (*Mogadara v. Holt*, Show. 318). ‘We take notice of the laws of merchants that are general, but not of those that are particular usages’ (per Holt C. J., *Lethulier’s case*, 1 Salk. 443). ‘When the custom has been judicially ascertained and established it becomes part of the Law Merchant which the courts are bound to know and recognize’ (per Lord Campbell, *Branda v. Burnett*, 12 Cl. & F. 787). ‘A system of equity, founded on the rules of equity, and governed in all its parts by plain justice and good faith’ (per Buller J., *Master v. Miller*, Smith’s L. C. i. 856).

⁴ *Lex Mercat.* 87.

indeed the basis of many of them, the so-called laws of Oleron stand pre-eminent.

The Laws
of Oleron.

On the continent of Europe we find a French Ordinance of Charles V (1364)¹ admitting the Castilians to trade in Normandy, ‘selon les Coustumes de la Mer et les droiz de Layron dehors,’ and in the Ordinance of the same king on the rights and pre-eminentes of the Admiral of France we have ‘ledit Admiral doibt administrer justice a tous marchans sur la mer selon les droitz, jugemens coustumes et usaiges d’Olleron².’ There is besides a tradition in a MS. in the Royal Library in the Escorial, that the rolls of Oleron were adopted in Castille by Alphonso X in the thirteenth century as positive law in suits between merchants and mariners, and that the laws in the fifth Partida of that body of Castilian law known as the Siete Partidas were framed in accordance with the rolls³.

There is sufficient evidence of the authority of those judgments in this country. In the archives of the city of London there are two MSS., one called the Liber Horn, the other the Liber Memorandorum. The Liber Horn is attributed to Andrew Horn, who was City Chamberlain during the reign of Edward II, and died in 1328. It contains a copy of the laws of Oleron. The Liber Memorandorum of the Corporation contains various ordinances and charters, none later than 15 Edward II, and in the middle, preceding some charters of William the Conqueror, which are there stated to have been copied in 1314, is another copy of the laws. In the records of Bristol, the great port of the West of England, there is another copy dating from the fourteenth century. From these facts we may draw the inference that the copies were kept for the purposes of reference and use. But we need not be contented with inference.

¹ *Bl. Bk. of Admiralty* (Rolls Series), i. lxiv. n.

² *Ibid.*, i. 448.

³ *Ibid.*, i. lxvii.

There is extant a judgement of the mayor and bailiffs of Bristol, that the master of a ship is liable for loss of cargo by the theft of the crew, and certified by them to the Chancellor as based on the *lex et consuetudo de Oleron*. This case, *Pilk v. Venore*, was originally tried ‘in plena curia coram maiore et ballivis et aliis probis hominibus villae et magistris et marinariis,’ and both plaintiff and defendant pleaded the *lex de Oleron*, saying, ‘talis est¹’.

The inquisition taken at Queenborough by command of Edward III, in the forty-ninth year of his reign, directed, amongst other things, inquiry to be made ‘about all mariners who lay violent hands upon or beat their masters against the laws of the sea and the judgement of Oleron made thereon,’ and also ‘concerning all mariners who are rebellious against the honest commands of their masters, and of masters who do not keep their mariners quiet at table or elsewhere as the judgements of Oleron do require²’.

In a fifteenth-century case heard in the Court of Admiralty, a master of a ship was tried for cruelty to a seaman according to the law of Oleron³. And in 1402, in the fourth year of Henry IV, Parliament petitioned ‘Que les Admirals usent leur leies tant solement per la ley de Oleron et anxiens leyes de la mere et per la ley d’Engleterre et nemy per custume⁴.

We know what the judgements of Oleron contained. They are judgements as to the power of the master to engage part of the ship’s furniture, and to sell merchant’s goods to raise funds for necessary expenses, his duties to all concerned in case of wreck, his treatment of sick mariners, his duty to jettison, accidental collisions in a roadstead and anchorage

Their
subject-
matter.

¹ Transcribed by Prynne (*Animad.* 117) from the records in the Tower. *Brevia Regis*, Tr. An. 24 Ed. III, no. 44, Bristol.

² *Bl. Bk. of Admiralty*, i. 161.

³ *Ibid.*, i. 255.

⁴ *Rot. Parl.* 3. 498.

therein, wages and perquisites of mariners, claims against the merchant for not providing, and against the master for not taking cargo, the time when freight is payable, the master's lien for freight, what is liable to contribute to a jettison, and the liability of pilots.

There is one instance in which a successful appeal was made to the Crown against the rule of the judgements. In 1285 Edward I gave judgement¹ on a complaint by the barons of the Cinque Ports, that the merchants of Gascony, England, Wales, and Ireland were compelling the English shipowners to contribute for jettison on vessel, apparel, and stores. Edward directed that only merchandise should contribute, thus overruling the judgements of Oleron² and the Roman law rule, and his judgement was apparently afterwards followed in the Mayor's Court at Oleron³.

No code of the rest of the *lex mercatoria* is extant, but some of its features are known, and it is hardly possible to doubt that it was a definite body of customary law recognized here and on the continent. Not only do enactments like the Statute of the Staple⁴ and the *Carta Mercatoria*⁵ speak of it as an entity distinct and intelligible, but what we know of the character of the tribunals who administered it supplies an irresistible argument. These tribunals were lay and not professional, they were not national, for they might be mixed. The men who formed part of a market Court at Antwerp might in six months be doing the same thing at St. Ives. This is beyond question, for the *Carta Mercatoria* provides that in all cases except capital a foreign merchant is to have if possible a *medietas de eisdem mercatoribus*, and the Statute of the Staple directs not only that where two strangers are

¹ *Munim. Gild.* (Rolls Series), i. 490. Rymer, Foed. a.d. 1285.

² *Bl. Bk. of Admiralty*, i. 97, Art. 8.

³ Ibid., ii. xxxiii. Ibid., 395. Coutumier of Oleron, c. xciv.

⁴ 27 Ed. III, st. 2.

⁵ 31 Ed. I. *Munim. Gild.* ii. 205.

parties the inquest is to be made up of strangers, and if one stranger then a jury *de medietate*, but that in every staple¹ there shall be a mayor having knowledge of the law merchant elected by strangers as well as denizens, two 'convenientable' constables chosen by the merchants, and two merchant aliens to be associated to the mayor and constables to hear the plaints of merchant aliens. The international character of the tribunal makes it certain that the law administered was international too. This is a very interesting entry illustrating this point in the Manorial Pleas published by the Selden Society², viz. a summons to all the merchants of as many communities as there were present at the fair of St. Ives, A.D. 1275³, to present themselves on the morrow *coram seneschallo* to consider and see that four merchants have justice and equity, inasmuch as their servant had been caught measuring canvas with a false ell and selling it. Of these *communitates*⁴ certainly one came from Ypres. It is alleged also⁵ that King Amauri I, who succeeded his brother Baldwin as King of Jerusalem in 1162, established a special Court of the Sea, and also a mercantile Court, *la Cort de la fonde*, consisting of a royal bailiff and a mixed jury of four

¹ The staple towns were Newcastle, Lincoln, York, Norwich, Westminster, Canterbury, Chichester, Winchester, Exeter, Bristol, Carmarthen, Devylen, Waterford, Cork, and Drogheda (27 Ed. III, st. 2).

² *Select Pleas in Manorial Courts*, i. 153.

³ This fair belonged to the Abbot of St. Ives, and the Court was presided over by his steward, but the merchants were the *pares curiae*.

⁴ A *communitas* was an association in which every individual guaranteed the trade debts of every other, 'his peer parcener and commoner.' See the remarkable case at the same fair (*Manor. Pleas*, i. 152), where the plaintiff, *B.* of Bordeaux, complains of *C.* and *D.* of Norwich, the *pares participes et communares* of *R.* and John his son, that the said *C.* *D.* *R.* and *J.* unjustly deforce him of £8 which they ought to pay 'eidem *B.* vel cuicunque de suis scriptum obligatorium inter ipsos confectum portanti' on Midsummer Day, 1274, for wines sold by *B.* to *R.* and *J.* at the fair at Boston on Friday before St. James' Day, 1273.

⁵ *Bl. Bk. of Admiralty*, iv. xvi.

Syrians and two Franks. It is not unreasonable to believe that, wherever the Court was held, the law administered was the same. The same people met each other in succession at the great fairs, where the same questions must have constantly arisen, and it is incredible that they would have administered a system in which their rights varied with the locality, they themselves being both litigants and judges. Owing to the exigencies of trade, merchants, of all men, require that the law should be known with precision. To the great fairs such as those at Lyons, Besançon, Antwerp, Winchester, Stourbridge, and St. Ives, merchants came from afar¹. The Courts were ‘popular,’ judgement being given by those who knew the customs, whether they were *prud-hommes* at Oleron or Barcelona², or *mercatores et marinarii* sitting on Bristol quay³, or merchants in a Court of Pie-poudre. ‘Popularity’ is however not peculiar to mercantile Courts, but was common to all early local Courts, such as the Manorial Court and the Sheriff’s Court in this country.

The
Piepoudre
Court.

The name Piepoudre was frequently given to those Courts which were attached to fairs ‘to determine the plaints of persons passing through who cannot make any stay there, such persons, that is to say, as are called pepoudrous⁴.’ These Courts were of record, and if the fair was a franchise

¹ We may notice the regulations of the ‘Feste de Pui,’ a society of foreign merchants, ‘that mirthfulness, peace, uprightness, gaiety, and good love may be maintained,’ in which we find ‘e pur ceo qe la feste du Pui est mut honore par la venue des compaignons, e tuit lui pluis de la compaignie sont marchantz hauntaunz les feires,’ so that they cannot come to London on the fixed day of the great feast, ‘le quel jour ceo est duraunt la feire de Sainte Ive et autres feires,’ the day is to be altered (*Munim. Gild.*, ii. 228).

² In *The Ordinance of Maritime Police*, published by James I of Arragon (1258), the Corporation of the Prudhommes of the Strand at Barcelona is spoken of as a council of administration in maritime matters of co-ordinate authority with the king himself (*Bl. Bk. of Admiralty*, ii. lxvii).

³ *Bl. Bk. of Admiralty*, i. 378.

⁴ *Liber Albus*, ed. Riley, 59.

of some lord the Court was held before the lord's steward¹. If not a franchise fair, the Court, like other mercantile courts, was held before a mayor and two coadjutors. In a great city like London the mayor was probably elected by the *communitas* of London², in the staple towns according to the Statute of the Staple, the foreign merchants had votes. So a Piepoudre Court could be held by special custom before the mayor and two citizens. The case of *Goodson v. Duffield*³ was a proceeding in error on a judgement in the Court of Pie Powder at Rochester, in which it was said that these Courts are held in divers cities, as in Bristol and Gloucester⁴. And here the record was 'Curia dom. regis

¹ Y. B. 6 Ed. IV, 3 b.

² The terms 'mayor' and 'communitas' go together. *Stubbs, Sel. Ch.*, 308.

³ Cro. Jac. 313, 2 Bulst. 21, and cf. *Howel v. Johns*, Cro. Eliz. 773.

⁴ I am indebted to the kindness of Mr. A. H. Wansey, of Bristol, for the following information regarding the Tolzey and Piepoudre Courts of Bristol, which still exist. A statement was drawn up in 1789 by Mr. Arthur Palmer, Prothonotary of the Tolzey Court, to the following effect:—'The Tolzey Court is an old court of record by prescription, dating by tradition from Saxon times, and sits every Monday in the year. The hundred of Bristol was originally in the honour of Gloucester (Madox, *F. B.* p. 17, *Magn. Rot.* 31 Hen. II). The honour vested in the Crown temp. John, when Bristol Castle became a royal residence. Among the royal officials was the seneschal, who was judge of the palace court, with which the old court became united, the seneschal being assisted by the bailiffs, and the court being held at the Tolzey, where the king's tolls were collected. The first sheriff of Bristol was appointed in 1373 by the charter (47 Ed. III), which made Bristol a county; a second sheriff was created by the Bristol Charter (15 Hen. VII), which directed that the two bailiffs should always be the two sheriffs. The seneschal or steward who presided in the Tolzey was thus a royal officer, the sheriffs sitting with him as *bailiffs of the hundred*. In this court was the process of "foreign attachment" of immemorial usage, to recover debts from foreigners who do not come to England to be served. The "foreign attachment" seizes their cargoes, ships, goods, and debts in Bristol, and enforces payment, like the process in the Lord Mayor's Court in London. In this court all actions of debt, assumpsit, trespass, trover, covenant, and other civil actions to an unlimited amount are tried, where the

pedis pulverisata (*sic*) tent. apud civitat. Roffens. coram maiore et duobus concivibus secundum,' &c. There was such a Court also at the fair of Stourbridge, which belonged to the Corporation at Cambridge¹, and this was held before the mayor and bailiffs of Cambridge.

The Gild Merchant.

In connexion with this popular or lay character of mercantile justice we may notice the institution known as the Gild Merchant, which seemingly was an association for the purpose, amongst others, of mutual arbitration. Members of the same gild were bound to bring their disputes before

cause of action arises within the city. The Court of Pie Poudre is a branch of, or a continuation of, the Tolzey, and is held annually in the open street, called the Old Market, before the steward and bailiffs, or one of them. It commences the day after the bailiffs are sworn, which is the 29th Sept., unless the 30th is a Sunday. It sits for fourteen clear days, during which the Tolzey at the Guildhall is suspended. Proceedings there are as in the Tolzey, and are styled "In the Tolzey Court, Bristol, held in the Old Market there." At the end of the fourteen days everything is adjourned into the Tolzey. To this day (1789) there is the Saxon practice of compurgators.'

According to the additional information kindly furnished by Mr. Wansey, down to 1868 there were no rules regulating process in these courts, whereas the Superior Courts of Westminster had the C. L. P. Acts of 1852, 1854, 1860, and various orders and rules. In 1871 these courts were mainly brought under the C. L. P. Acts. By 5 & 6 Will. IV, c. 76, the Recorder of Bristol was made judge of these courts. The records only go back to 1827. All kinds of actions may be tried in them, provided they arise in the city, and there is no appeal. No sittings are now held in the Old Market, but the court is duly opened and adjourned into the Tolzey, but for the fourteen days the style is as of old. In 1878 the Judicature Acts were applied to the courts.

I have also to acknowledge the courtesy of Mr. L. Smeathman, the Town Clerk of Hemel Hempstead, who tells me that there was till 1898, when the borough was reincorporated, a Piepoudre Court held there once a year, though in his time the only work done was connected with the management of the tolls, buildings, stallages, &c. It was held before a bailiff and jury. Under the new charter the mayor is styled 'mayor and bailiff.' I have not been able to inspect the records.

¹ Dyer, 132. 6, pl. 80.

the gild before litigating the matter elsewhere. This function of the gild merchant was recognized by the kings. The great Gild of St. John of Beverley¹ of the Hans House held charters from the Archbishops of York, with the royal licence of Henry I, granting to the town and burgesses a gild merchant and the right of holding pleas among themselves, and this grant was confirmed by an *inspeximus* charter of Richard II in 1379. The city of York² has a charter of John, dated 1200, giving a gild merchant with the liberties pertinent, and in 1581 the queen, in consideration of the losses and decay of merchants, allows the merchants there to elect a governor and eighteen assistants, with power, *inter alia*, to try all suits among its members or between the latter and others³.

What may have been the relations between the merchants and the Crown under the Norman and early Plantagenet kings we have at present no means of knowing, but judging from the hardness of the task of consolidating the common law, it may well be that this outlying portion was left to itself for the time being. In any case Edward I made the connexion firm. The foreign merchant was a person to be considered and treated tenderly, for with him the king could bargain directly as to customs without the intervention of Parliament, and money was never too plentiful, and in return the king gave him his support against the 'rings' or 'trade unions' of the English merchants, and made himself the final Court of Appeal.

For eight hundred years merchants have cried for speedy justice. Mercantile men must be about their business, for

¹ *English Gilds* (Brentano), 150.

² *The Gild Merchant* (Gross), ii. 279.

³ In a charter to the city of London (52 Hen. III) it is granted to the citizens not to plead without the walls except (*inter alia*) to pleas concerning merchandise, which are wont to be decided by Law Merchant in the boroughs and fairs by four or five of the citizens there present (Norton, *Comm.* 416).

trade will not wait. Once, the merchant was here to-day and gone to-morrow; now, he will sooner cut his loss than have his case hung up indefinitely; if he cannot get king's justice he will go to arbitration. In a report drawn up in the reign of Henry II on the 'customs' of Newcastle-on-Tyne, as they existed temp. Henry I, the following sentence appears: 'Inter burgensem et mercatorem si placitum oriatur, finiatur ante tertiam refluxionem maris,' which indicates a mercantile court doing speedy justice¹. In the Doomsday of Ipswich², which is a recension of the old book of the second year of John, and drawn up in the nineteenth year of Edward I, it is stated that whereas pleas between persons sitting and dwelling in the town should be pleaded 'by two days in the week,' the merchant stranger was treated with that greater consideration which seemingly was everywhere shown to him:—

‘The plees betwixe straunge folk that men clepeth pypoudrous, shuldene ben pleted from day to day . . . The plees in tyme of feyre betwixe straunge and passant shuldene bene pleted from hour to hour . . . and the plees yoven to the lawe maryne, that is to wite, for straunge marynerys passaunt and for hem that abydene not but her tyde, shuldene been pleted from tyde to tyde.’

Among the questions put to the citizens of London on the Iter held by Hubert de Burgh and his associates³ and the answers thereto⁴, we note the following:—

Q. 9. ‘May the Bailiffs (these are afterwards called Sheriffs) of the city determine the plaints of persons passing through the city who cannot make any stay there, such persons, that is to say, as are called pepou-

¹ Stubbs, *Sel. Ch.* 112. So Bracton, l. 5, f. 334 a ‘Item propterea qui celerem debent habere iustitiam, sicut sunt mercatores quibus exhibetur iustitia pepoudrous.’ ² *Bl. Bk. of Admiralty*, ii. 23.

³ 5 Hen. III.

⁴ *Liber Albus*, 55.

drous as to debts due or injuries done, or must they await the sitting of the Hustings?'¹

Ans. 'It is answered that of usage such pleas are not holden out of the Court of the Hustings. But it is further provided and agreed that in future the mayor and sheriffs, assisted by two or three aldermen, shall hear such plaints and that immediately from day to day.'

In the Ordinances² which Edward I made when he took into his hand the franchises of the city of London is the following:—

'And whereas the king doth will that no foreign merchant shall be delayed by a long series of pleadings, the king doth command that the Warden or Sheriffs shall hear daily the pleas of such foreigners as shall wish to make plaint . . . and that speedy redress be given unto them.'

Not only was the king doing his best to get the merchant speedy justice, but he also invited him to regard the King in Council as the ultimate fountain of justice. The Statute of the Staple³ is an epitome of the royal policy in this regard. The king's judges are not to take cognizance of things touching the staple (§ 5). This is the province of a lay tribunal elected by the merchants, who are to apply the law merchant and not the common law (§ 21). Merchants are to have right done them from day to day and from hour to hour (§ 19). In case of doubt the matter is to be shown to the Council, or if any merchant complains of want of justice it shall be redressed by the Chancellor and Council without delay (§ 21).

There are two celebrated cases which found their way to

¹ 'Et husting sedeat semel in hebdomada videlicet die Lunae.' *Carta Civ. Lond.*, *Sel. Ch.* 108 (temp. H. I).

² *Liber Albus*, 257.

³ 27 Ed. III, st. 2.

the king. The first was the case of Simon Dederit of Guynes¹ (a foreigner, it will be noticed) which came from the great fair at St. Ives on a point of mercantile law, and shows the carefulness of the tribunal. This was an appeal to the *Dominus Rex* at Westminster, ‘et praedictus Simon dicit quod lex mercatoria talis est in omnibus et singulis nundinis per totum regnum. Paratus est verificare.’ His opponent denies this, and the sheriffs of London, Lincoln, Winchester, and Northampton are each directed to produce before the king twelve good and lawful merchants to recognize, &c. In the second case² a merchant stranger complains before the Chancellor and judges in the Star Chamber. He had come into this country on a safe conduct, and his goods had been stolen at Southampton. The Chancellor said that such a person was entitled to sue here according to the law of nature in the Chancery, that is the law merchant, which is law universal throughout the world.

The Law
Merchant
and the
Chancery.

‘Cest suit est pris par un marchant alien que est venus par safe conduit icy, et il n'est tenu de suer selonques le ley del terre a tarier le trial de xii homes et autres solempnites del ley de terre, mes doit suer icy et sera determine selonques le ley de Nature en le Chancery, viz. ley Merchant que est ley universal par tout le monde³.’

One cannot help being struck with the fact that the Chancellor is here identifying the law of nations with the law of

¹ 8 Ed. II, cor. reg. Plac. in Dom. Cap. Westm. 321.

² Y. B., 13 Ed. IV, p. 9.

³ On which case Jenkins (Rep. 102) notes that if a merchant alien has a controversy with an Englishman or another merchant alien, these controversies should be decided in the Chancery or the Star Chamber, or before the King's Council, or at common law, according to the law of nature and nations. Cf. a note to the same effect on a case, 2 Ric. III, p. 12, where three Lombards sued in Chancery, and the Chancellor called the judges into the Exchequer Chamber to consult (Rep. 164-5). Cf. also two cases mentioned in *Sel. Pleas in the Court of Admiralty*, i. xlvi-ix (Selden Soc.).

nature, just as the Roman lawyers identified the *ius gentium* with the ideal *ius naturae*. And here, we may surmise, lay the bond between the Chancellor and the merchants. He, like the praetor, considered what was *aequum et bonum* and what was agreeable to the *mores*, or the usages of honest and honourable people. One might go further and surmise that the law merchant was in fact largely based on the Roman law. Possibly the law merchant was the channel through which the Roman law chiefly affected our law. The four consensual Roman contracts cover most of the field of mercantile law. The contract of affreightment is covered by D. 19. 2. 13, the doctrine of general average by D. 14. 2. 1, and the contracts of bottomry and respondentia by D. 22. 2. There is some corroboration of this view in the story told by Malynes¹ of the fair at Frankfort, where a question of suretyship arose. The opinion of the merchants was demanded thereon, ‘wherein there was great diversity, so that the civil law was to determine the same . . . according to the title *de mandato consilii*.’ We may remember that the civil law was recognized as proper in the Court of Admiralty². It is almost certain, from what Lord Blackburn³ has said, that the right of ‘stoppage *in transitu*’ came through the Courts of Equity, and that it is the same right as that *revendication* which on the continent was the representative of *rei vindicatio*. We may give one or two particulars in which the Chancellor and the merchant agreed as against the common lawyer. As Mr. Bigelow has said in the introduction to his book on Bills Notes and Cheques, in the foreign custom

¹ *Lex Merc.*, p. 69. Malynes' date is 1622. Pandect law was the law of Hanse towns; Sohm, *Inst.* 6.

² Bridgeman's case, Hob. 11 (11 Jac.), a case of bottomry and borrowing of necessity. Even to-day, on a question of agency, the Digest is referred to (*Durant & Co. v. Roberts and Keighley, &c.* [1900] 1 Q. B. 629, C. A.), though see the judgements of the House of Lords reversing this decision, [1901] A. C. 240.

³ Blackburn, *On Sale*, p. 314 sq.

which the merchants brought into England there were two peculiar features which the Common Law regarded with aversion—negotiability and grace. Negotiability is the property by virtue of which certain choses in action, that is undertakings to pay, pass from hand to hand like cash on delivery. The common law repudiated the notion that a promise of *A* to *B* could be treated as a promise extending to *C*, a view that was shared by the classical Roman law. Accordingly down to the Judicature Act of 1873 if it was desired to assign a chose in action, it had to be done with the assistance of equity. So Malynes writes:—

‘And herein you are to note that in the buying by Bills it may be made payable to seller or to the bearer thereof, and so all the parties are bearers thereof unto whom the same is set over by tradition of it only, and this is called a rescouter in payment used among merchants beyond the seas . . . The common law of England is directly against this course; for they say there can be no alienation from one man to another of debts because they are held choses in action¹.’

As regards grace, the Common Law said that a man must perform on the day he promised to perform, unless he had the promisee's consent. The custom of merchants allowed ‘days of grace,’ the number varying at different markets. Three days was very usual, and in particular was the custom of London². The Courts of Equity never regarded time as necessarily of the essence of the contract, and this divergence between the equitable and common law view is dealt with in the Judicature Act.

Neither Chancellor nor merchant set any store on consideration or seal. There is no evidence that the doctrine

¹ *Lex Merc.*, p. 70.

² *Coleman v. Sayer*, 1 Barn. 303 (2 G. II), where the Common Serjeant and the foreman of the jury spoke to the constant practice of the City, and this was accepted by the C. J.

of consideration came from Chancery ; the evidence is the other way. In spite of the efforts of Lord Mansfield, as will be remembered, the Courts of Common Law forced on the custom of merchants, which knew nothing of it, our purely indigenous doctrine of consideration¹. This view need not surprise us, if we remember that the civil law has very little corresponding to our doctrine of consideration ; consent made the contract ; it was dishonourable to break a promise once made. It is worth noticing that the early writers of treatises on the law merchant, Malynes (1622) and Marius (1670), were not lawyers but merchants, and that Malynes regards not so much what the law may say as what merchants will say :—

‘The credit of merchants is so delicate and tender that it must be cared for as the apple of a man’s eye’ (p. 76). ‘The nature of a Bill of Exchange is so noble and excelling all other dealings between merchants, that the proceedings therein are extraordinary and singular, and not subject to any prescription by law or otherwise, but merely subsisting of a reverend custom used and solemnized concerning the same’ (p. 261). ‘Such is the sincerity and Candor Animi amongst merchants of all nations beyond the seas in the observation of plain dealing concerning the said Bills Obligatory² that no man dare presume to question his own hand’ (p. 74).

He adds that in the East³, and sometimes in the Low Countries, they will put a seal to it, but this is not a universal requirement. So Sir John Davis, writing ‘Concerning Impositions,’ about the end of the seventeenth century, says :—

¹ *Pillans v. Van Mierop*, 3 Burr. 1663.

² The Bill Obligatory was a promissory note, prefaced by an acknowledgement of indebtedness. Cf. *Lex Merc.*, p. 74.

³ Sir F. Pollock has been good enough to point out that the Eastern seal is not a device but an engraved signature, though probably seldom if ever autograph.

'Whereas at Common Law no man's writing can be pleaded against him as his act and deed unless the same be sealed and delivered, in a suit between merchants, Bills of Lading and Bills of Exchange, being but tickets without seals, letters of advice and credence, policies of assurance, assignations of debt, all of which are of no force at the Common Law, are of good credit and force by the Law Merchant.'

There is one comparatively small point which we may perhaps notice. By the 14 & 15 Vict. c. 99 the parties to a civil action became for the first time competent witnesses. The Court of Chancery never regarded this rule. The parties before it were always competent and frequently compellable witnesses. So, too, in a merchant suit. Malynes (p. 299) mentions the practice of the Chancellors of issuing commissions to Masters in Chancery or to merchants to report to the Chancellor, whereon he issued decrees :

'They may examine witnesses upon oath upon anything in question where there wanteth proof, or they may minister the oath to either party upon pregnant occasions to bolt out the truth.'

And again at p. 92 :

'Therefore when merchants are contending in any Courts of Equity or law where they are delayed for many years in continual suit at their great charges, then it tendeth to the interruption of trade and commerce in general and the overthrow of parties in particular : whereof the Law of Merchants hath a singular care to provide for, and therefore doth many times (though not without danger) admit the proof to be made upon the parties oath, if witnesses be absent.'

The Bona Fide Purchaser.

Finally, in one very important matter the Chancellor and the merchant saw eye to eye. Both loved the Bona Fide Purchaser. In his interest the common law rule of *nemo dat quod non habet* was set aside. Neither got so far as to the maxim

possession vaut titre, but an approach was made to it. Possibly the standpoint of the Chancellor was not quite identical with that of the merchant, but it is permissible to suggest what that of the latter was. It was, we think, intimately connected with the desire for *celeris iustitia*, on which we have remarked already. The press of business does not permit the loss of time incident to examinations of title. The negotiable instrument, the sale in market overt, the legislation in the Factors Acts, are all manifestations of the same feeling that the honest purchaser or pledgee ought to be allowed to treat the possession of his seller or pledger as equivalent to title or to full authority to sell or pledge. The rule about sale in market overt of course comes from old market law and the fairs, where any one could search for his goods if he chose. A person buying in these circumstances took a good title except against the Crown, and afterwards, by 21 Hen. VIII, c. 11, against the prosecutor to conviction.

While the local Courts at seaports and markets were administering the law merchant, we notice that the Admiral's Court, which was established in the reign of Edward III for the purpose of dealing with piracy, began to excite the apprehensions of the towns possessing franchise jurisdictions. To these fears must be attributed the statutes 13 Ric. II, c. 5, and 15 Ric. II, c. 3, which defined the admiral's jurisdiction¹.

Struggles
between
Local
Admiralty,
and Com-
mon Law
Courts.

Although the admiral's jurisdiction in maritime and commercial affairs was not explicitly and authoritatively affirmed

¹ These fears were not groundless. In the *Cor. Reg. Rolls*, 7 Rich. II, rot. 51, in *Hamely v. Alveston*, the jurisdiction of the seaport of Padstow was challenged in a question of trespass to a ship on the ground, amongst others, that it had not been deputed by the admiral to try Admiralty causes (*Ad. Pleas*, i. xlvi). In 1369 (Cl. 42 Ed. III, m. 2) a case of breach of contract had been tried before the admiral, who gave judgement for defendant. The plaintiff then arrested the ship in another action for the same matter in the Sheriff's Court of London. It was held that it was *lis iudicata*, and could not be reopened. *Ad. Pleas*, i. xlvi (Seld. Soc.).

till the reign of Henry VIII, when, following on some admiral's patents about 1520-30¹, the statute 32 Hen. VIII, c. 14 (1540), gave the admiral jurisdiction to try summarily matters of freight or damage to cargo, there is sufficient evidence that the Admiralty had not confined itself to the piracy or spoil cases, but had endeavoured with some success to take cognizance of mercantile suits. During the fifteenth century, though the information at our disposal is scanty, there are records proving that the Admiralty was making efforts to try cases of freight², conversion of ships³, and contracts made within the bodies of counties⁴, and that these efforts were being met by applications for prohibition and *praemunire*.

But in the reign of Henry VIII we have the files of *Libels* in the Admiralty Court, which tell their own tale. In the files between the years 1527-41 there are recorded 252 suits. Of these ninety-five are concerned with freight, breach of contract, non-delivery, damage to cargo, misconduct and default of mercantile agents abroad, sales of ships and goods, contracts and debts arising abroad, necessaries, jettison, average, money lent upon security of ship or cargo; for conversion and other torts thirty-six, for wages twelve, and for contempt, i. e. suing elsewhere, and questions of jurisdiction eighteen, while the cases in piracy, spoil, and robbery only number twenty-seven⁵.

In the reign of Elizabeth the Admiralty Court takes a more confident position. The queen is approached because of the 'encroachments' made on the admiral's jurisdiction.

¹ See the Duke of Richmond's patent (1525), *Ad. Pleas*, i. lviii, embracing all maritime contracts between shipowners and others, with a *non obstante* clause. On the other hand we may note that in 1538-9 a supersedeas issued to the Admiralty Court which had inhibited the local court of the bailiffs at Yarmouth in case on a contract of pilotage. *Ad. Pleas*, i. 78.

² *Rot. Pat.* 11 Hen. IV, pt. 1, m. 12.

⁴ Coke, *Inst.* iv. pp. 139-42.

³ Rastell's *Ent.*, fo. 24.

⁵ *Ad. Pleas*, i. lxxxiii.

Her letter is extant addressed to the Mayor and Sheriffs of London¹, in which she considers it 'very strange' that they are taking on themselves to try cases on contracts arising upon and beyond the seas, which properly belong to 'our Court of Admiralty,' feigning the same to have been done within some parish or ward of London. She directs them to desist (circa 1570).

The seaport towns had fallen on evil days. Not only were they jealously watched by the Admiralty Court, and called on to produce their charters of exemption or of jurisdiction, but also by the Courts of Common Law, which had designs upon them both, and were preparing to prohibit freely. The local mercantile courts fell into desuetude, one or two Piepoudre Courts still linger on, the only local maritime court that survived the Municipal Corporations Act, 1835, is the Admiralty Court of the Cinque Ports, which goes back earlier than 1300².

The field was then left to the Common Law Courts and the Admiralty Court. The Common Law gave no remedy in case of contracts made or torts committed abroad. The Admiralty relieved the want, but had no jurisdiction within the body of a county. This restriction the Common Law Courts enforced rigorously, issuing prohibitions wherever a maritime contract had not actually been made, or goods not actually supplied on the high seas, and permitting the fiction that a contract really made at sea was made at the Royal Exchange in order to withdraw the suit from the Courts of Admiralty³. The Admiralty jurisdiction over contracts then fell into disuse. Meanwhile the administration of the mercantile law in the Common Law Courts was not satisfactory, owing doubtless to the fact that it had never been made a professional study. As a result

¹ Marsden's *Admiralty Cases*, 230. ² *Admiralty Pleas*, ii. xix-xxi.

³ *Bl. Comm.* iii. 107.

'when questions necessarily arose respecting the buying and selling of goods, respecting the affreightment of ships, respecting marine insurances, and respecting bills of exchange and promissory notes, no one knew how they were to be determined. Not a treatise had been published upon any of these subjects, and no cases respecting them were to be found in our books of reports. . . . Mercantile questions were so ignorantly treated when they came into Westminster Hall, that they were usually settled by private arbitration among the merchants themselves¹'.

Before Lord Mansfield appeared, 'in courts of law all the evidence in mercantile cases was thrown together, they were left generally to a jury, and they produced no general principle,' to be 'known to all mankind not only to rule the particular case then under consideration, but to serve as a guide for the future²'.

Lord Mansfield employed his learning and his genius, 'not only in doing justice to the parties litigating before him, but in settling with precision and upon sound principles general rules afterwards to be quoted and recognized as governing all similar cases³'. He may truly be said to be the founder of the Commercial Law of this country.

¹ Camp., *Lives of the Chief Justices*, ii. 402.

² *Lickbarrow v. Mason*, per Buller J., 2 T. R. 63.

³ Ibid. See also Lord Campbell's account of Lord Mansfield and his special jurymen (*Lives*, ii. 407).

CHAPTER XXVII

THE JEW

THE position of the Jew was peculiar and unhappy. In The Jew
and the
King.the feudal system there was no place for him. He was an alien, and as such had no political rights, as such could hold no estate of inheritance in land, his very residence in the country being on sufferance. He was moreover a hereditary alien, for, as he was not permitted to swear on the Pentateuch except for the purposes of judicial proceedings, he was unable to do homage or fealty. No Christian might do homage or fealty to him, he could be neither any lord's man, nor any man's lord. He was the king's chattel. Unlike the 'clerk,' he lacked the powerful aid of the Catholic Church, and unlike the foreign merchant he could appeal to no temporal king to use the weapons of diplomacy in his favour. The counsels of self-interest forbade our kings to scare away the foreign merchant, our ordinances proclaim our pains to invite their welcome visits, but the Jews required no such attentions. Though they lived here on sufferance, they could hardly leave without permission.

Of the steps by which the Jew reached his peculiar relationship to the Crown nothing is known, but though it is extremely probable that the Baronage ardently desired property in a Jew, we cannot doubt that the Crown lawyers argued that what belonged to no one in particular belonged to the king. As a matter of law, the Jew was regarded as treasure trove. The authoritative legal view is expressed in

one of the Ordinances in the so-called ‘Laws of Edward’ as follows :

‘Be it known, that all Jews wheresoever they may be in the realm are of right under the tutelage and protection of the king, nor is it lawful for any of them to subject himself to any wealthy person without the king’s license. Jews and all their effects are the king’s property, and if anyone withhold their money from them, let the king recover it as his own.’

This was a correct statement of the law in Glanvill’s day. After the Conquest the Jews came to this country in considerable numbers and settled in most of the important towns in England, where they resided in a separate quarter of their own. Though it appears that they practised handicraft to some extent, the strength of the merchant gilds prevented them from engaging in the larger operations of commerce under favourable conditions. But one line of business, remunerative, necessary, and beset with dangers lay open. The Jew could and did lend his money. The ordinary rate of interest was apparently 43½ per cent. per annum. The ‘vadium’ charged the debtor’s land and chattels with principal and interest, and in default the creditor was entitled to seisin and might either sell the lands after a year’s possession or hold them till he satisfied the debt out of the profits. But the Jew creditor could not be seised of land otherwise than as pledgee.

The activities of the Jews in this direction were favourably regarded by the Crown. It is not too much to say that they were the honey bees of the king. They carefully collected and stored in accessible places the golden hoard on which the king, whenever his necessities pressed, could lay his hand. This meritorious industry it was the royal interest to protect. Protective privileges were first given by Henry I to a particular family, confirmed by his suc-

sors, and extended to all Jews by a Charter of King John in 1201.

Under this Charter they could travel and settle where they pleased, they could freely buy, they could sell their securities after a year and a day's possession, they went free of tolls, and of all jurisdiction except of the king and his castellans, and they could claim to be tried by their peers and to be sworn on the Pentateuch. In all cases between a Christian and a Jew, the plaintiff must produce two witnesses, a Christian and a Jew. But if a Jew were sued by a Christian who failed to produce due evidence, the Jew could clear himself by his oath on the Pentateuch, while the Christian in like case had to wage his law with eleven compurgators.

In their own quarter, the Jewry, the king's writ did not as a rule run except in pleas of the Crown or between Christians and Jews. Cases between Jew and Jew were left to their own tribunals and settled according to their own law.

Whatever financial assistance the kings had got from individual Jews, the practice of 'talliaging' their community did not commence till 1168, when Henry II demanded from them an aid of 5,000 marks. It was paid, but not with alacrity, nor without signs of royal displeasure. Twenty years later, in the year of the Saladin tithe, Henry raised at one blow £60,000 from them collectively, which equalled very nearly half of the sum raised from the country at large.

The Jewish community 'talliaged.'

An unfortunate affair grievously affected the fortunes of the community. At the coronation of Richard the leading men of the Jewish community, desiring to pay their respects to the new king, thronged to the palace, were hustled by the crowd, and a general affray ensued. The Christians pursued the Jews to their quarter, and massacred, burnt, and looted as they could. The example was followed at other places, notably at York, where 'good guidance' led

the rioters to the Cathedral where the ‘vadia’ or securities had been placed by the Jews for safe custody, and the bonds were then burnt. This touched the Crown closely, for the bonds were not in duplicate. Accordingly when Richard returned from his captivity, registries of these bonds, ‘Archae,’ were established in the principal towns and administered each by four chirographers, two Christian and two Jews chosen by juries summoned by the Sheriff. All loans were to be put in the legal form of a chirograph before these officials, who kept a copy, and also a register of all the chirographs and all subsequent dealings with them. Unregistered transactions seem to have been of no effect, indeed an acquittance required enrolment in the Exchequer.

This system, as Mr. Rigg the learned editor of the Jewish Plea Rolls¹ remarks, placed the Jews at the mercy of the Crown, for in time of need all that the king had to do was to order a scrutiny of the ‘Archae,’ and having then ascertained the financial position of his chattels, he proceeded to tallage them with scientific precision, and if they were refractory, he attached their bonds and their persons till they met his demands.

The Scac-
carium
Iudae-
orum.

In connexion with this system was the establishment in the Exchequer of a special tribunal for the trial of Jewish causes, the Scaccarium Iudaeorum. Probably the Exchequer had always taken Jew causes, as the Jew was always the king’s debtor, but in 1198 we find sitting with the Barons of the Exchequer four ‘custodes Iudaeorum,’ of whom two were Christian and two were Jews, but these were the only Jews ever appointed. These officials were later known as ‘Justices of the Jews,’ but they had not exclusive jurisdiction over the Jews. Apparently they seldom, if ever, sat out of London, nor so far as we know did they take criminal cases. It is rather hard to see how they could, as they were merely

¹ In the series of volumes published by the Selden Society.

a branch of the Exchequer, which was not a court of criminal jurisdiction.

The function of these Justices or Guardians of the Jews was to protect their clients in their privileges, especially in matters of procedure, for the Jew, like the foreign merchant in London, could wage his law three-handed, and could claim, as defendant in cases arising in the Jewry, a jury '*de medietate*', and he was exempt from the jurisdiction of the ecclesiastical courts. But these privileges, though nominally belonging to the Jew, were really prerogatives of the Crown, which could be and were waived by the Crown at its pleasure.

There never was any real doubt that the Jews could be impleaded in civil matters either '*coram Nobis*' or '*coram Iusticiariis Regis*', while the criminal cases, of which the most important were coin clipping, forgery, and some strange accusations of ritual murder, were either tried before the Justices, usually in eyre, or a special commission.

Perhaps we are safe in supposing that the Exchequer of the Jews was the normal forum for the trial of all the London list of Jewish causes, and such from the country as were not for some reason or other taken by the king's judges on circuit. Once we hear of the Justices receiving a royal order to make a domiciliary visitation of the Jewries to find hidden hoards of wealth, and it seems that in this branch of the Exchequer were administered the estates of Jews deceased. This was a duty of great importance. The Jew alive or dead was of value. In his life he could be mortgaged, assigned, or subdemised with his arrears of tallage, after his death his estate was valued by a mixed jury and his representatives, and the least portion of it that was appropriated for the king's use was a third: the rest was allowed to devolve according to the disposition of the

deceased. If the deceased left infant children, the king had their wardship and marriage, both lucrative incidents.

It is not needful here to follow in detail the fortunes of the community. Let it suffice to say that though grievously oppressed, yet they thrived among the impoverished barons to such an extent that they were becoming masters of great estates in the country, and began to assume baronial state. Then, as Mr. Rigg observes, a grave political peril was imminent: for estates acquired by the Jews potentially passed into the hands of the king. Anti-Semitism joined hands with constitutionalism, and commencing in 1269 dealt repeated blows on the Jewish community, till in 1290 Edward banished them from the kingdom.

APPENDIX I

THE WRIT IN *CONSIMILI CASU*

WE have seen that the Norman kings practically recognized no limits in their powers of writ-making. But in 1258 this power was attacked. It was by this time perceived, that whoever made the writs made the law, because the writ was a declaration that, if the plaintiff proved his statements, he was entitled to relief. The inhibitory effect of the Provisions of Oxford on the writ-making of the Chancellor was such that it was found necessary to enact in the Statute of Westminster II¹, that ‘as often as it shall happen in Chancery that in one case a writ is found, and in a like case falling under the same right and requiring like remedy, no writ is found, the clerks in Chancery shall agree in making a writ.’ These writs were made *in consimili casu* with the older forms, and produced that large class of action called ‘Trespass on the Case,’ or shortly, ‘Case.’

The grievance had become pressing. ‘Non potest quis,’ says Bracton, ‘sine brevi agere.’ The forms of the writs had become stereotyped, and if a plaintiff went to the Chancery, the *officina brevium*, and found no writ which would fit his grievance, he went without a remedy. To perceive the true importance of this statute, we must bear in mind that the early actions in contract were three in number :—

- i. Covenant, which lay for breach of promise under seal.

¹ 13 Ed. I, c. 24.

ii. Debt, which lay for the recovery of a sum certain alleged to be due, founded on a contract express or implied ; this included actions for goods sold and delivered, money lent, work done, money paid, and money had and received.

iii. Detinue, which lay for recovery of chattels wrongfully detained by defendant, a contract often fictitious being alleged, which bound the defendant to re-deliver and which he was not allowed to deny. Debt was originally a general action to recover chattels, or secondly, their value. Then came a differentiation : if the action was for the specific chattels or coins, it was 'in the detinet,' i. e. detinue ; if for the value, it was 'in the debet,' i. e. debt.

It was thus impossible to sue on an executory contract, i. e. a promise to do something, unless the promise was under seal.

The difficulty was met as follows :—

If an injury was committed to property in possession, or to the person accompanied by actual contact, an action lay in trespass with an allegation of *vi et armis contra pacem*.

After the statute 'case' lay for the same injuries where there had been no actual or immediate contact, and the damage was consequential, with an allegation of *contra pacem* only.

E. g. *A* throws a log and hits *B*—this was Trespass. *A* throws a log, it lies and *B* trips over it—this was Case.

So *A* leaves his horse with *B* to shoe. *B* runs a nail into the hoof and injures it. The plaintiff brings trespass on the case. If he had been in possession, he could have brought trespass, but the wrong suffered was the same whether the horse was in the owner's stable or the smithy¹.

It lay for the consequences of a wrongful act ; originally for a malfeasance, then for a misfeasance, i. e. doing an action

¹ Y. B., 46 Ed. III, 19 (19).

lawful in itself in an improper manner, lastly for a non-feasance with an allegation of *quare assumpsisset*.

Both trespass and trespass on the case are purely tortious. The step from misfeasance to non-feasance was short, but was taken with difficulty and great reluctance, though it was felt to be logically weak to hold a man responsible for carrying out an undertaking badly, and to take no notice if he never tried to carry it out at all. On the other hand, the defendant usually presented the plaintiff with the dilemma of 'tort or contract?' If tort, where is the act? if contract, where is your covenant?

Some cases in the Year Books indicate the legal position.

(a) The defendant undertook to carry the plaintiff's horse across the Humber¹; he overloaded the boat and the horse was drowned. Here was a tortious act. And though an undertaking on an *assumpsit* was alleged, it was unnecessary.

(b) The defendant *manucepit equum de infirmitate* and afterwards made his cure so negligently that the horse died². This was also regarded as tortious, the plaintiff not using trespass as he could not allege and prove force.

(c) The same circumstances. The defendant 'assuma sur luy a curer son cheval d'un certain maladie,' and he so negligently and improvidently 'imposuit medicinas' that he killed the horse³. This, oddly enough, was taken as an omission, and it was held that the allegation of *assumpsit* was material, for otherwise the defendant owed no duty to the plaintiff. This is still tortious, the writ being in 'case,' but one of the judges very nearly stepped over from tort into contract in saying that the count 'negligenter imposuit' was void. 'If,' he said, 'I have a bad hand and he puts his medicine on my heel, through which negligence my hand is maimed,

¹ Ed. III, 22 Ass. 94 (41).

² Y. B., 43 Ed. III, 33 (38).

³ Y. B., 19 Hen. VI, 49 (5).

I shall have no action unless he has taken upon himself to cure me.'

If the words 'negligenter imposuit' were void for immateriality, the judge must have considered that the *assumpsit* and doing nothing afterwards gave a good cause of action.

This probably marks the transition period, for in earlier cases¹ an undertaking and nothing done afterwards was held to be only actionable in covenant, i. e. if under seal. Thus when the defendant undertook to make a house in a certain time and did not do it at all, there was no action on the agreement, though the opinion was expressed that if the thing had been commenced and then by negligence not done, an action would lie.

If a man has once begun to meddle, and then abstains, acts and omissions can be regarded as a chain of conduct leading up to the loss sustained.

It then began to be suggested that omission of due care after *assumpsit* was in its nature an action in contract. When omission during performance had once been allowed to be actionable, the next step was to give the same effect to omission at any time after *assumpsit* if followed by damage. It is not hard to see the connexion.

The word *assumpsit*, or 'undertook,' conveys two ideas, one that of intermeddling, the other of a promise. The first is the earlier and in its nature 'tortious,' the latter is contractual. The two ideas are closely connected. At present a binding contract can be made by conduct as well as by words spoken. The conduct of the blacksmith who takes my horse to his smithy, where he neglects his work, may be regarded either as the first of a series of tortious acts resulting in damage, or as raising an implied promise to do the

¹ Cf. Y. B., 11 Hen. IV, 33 (60); 2 Hen. IV, 3 (9); 3 Hen. VI, 36 (33).

work properly, on the faith of which I parted with the horse, and got it back damaged.

This ambiguity in the word ‘undertook’ was noticed by one of the judges in *Corbett v. Packington*¹, who observed that the word occurred in the declaration in *Coggs v. Bernard*², but that the tortious application must be given to it, as no consideration for a promise was shown, and the plea was ‘not guilty.’

By the time of Henry VII it seems to be settled that an action on an *assumpsit*, i. e. on a promise, lay in case of a mere omission, which is not quite the same as saying that for an action for an omission one must allege *assumpsit*—i. e. an intermeddling. The view, however, lingered that the action was in tort, and as such, it was thought unnecessary to allege a consideration in the form of a *quid pro quo*, or a benefit, to the defendant: it was enough to prove a detriment to the plaintiff. ‘If one covenants [this must mean ‘promises’] to build me a house by such a day, and he does nothing toward it, I have an action on the case for his non-feasance just as well as if he had done it badly, for I was in danger by it³.’ This marks a distinct advance on the views held *temp.* Henry IV.

This last stage was reached when it was perceived that a promise could be regarded as a detriment, and thus support could be found for the bilateral executory contract.

But this is not all. A man could never bring ‘debt’ unless he claimed a fixed sum, and showed a *quid pro quo*—i. e. he was either suing for money which he had lent, or for the price of money’s worth which he had given to the defendant; so that as a fact the defendant had had either money or money’s worth. Here we get the notion of advantage to the defendant; while in *assumpsit* what induced the Court to

¹ 6 B. & C. 268. ² 1 Sm. L. C. 167. ³ Y. B., 20 Hen. VII, 8 (18).

allow the plaintiff to succeed was the feeling that he had suffered detriment from the defendant's conduct.

In the end, *assumpsit* drove 'debt' from the field, because, in debt the plaintiff could be met by 'wager of law'; in *assumpsit* he could not. But the double aspect of consideration still survives, testifying to its two sources; it is still a benefit to one party or a detriment to the other.

A 'Common Calling.'

The liability of the 'common carrier' and the 'common innkeeper' takes us back to the time when *assumpsit* was acquiring its contractual significance. That liability which is to carry any applicant's goods, or to lodge the applicant, if there is room, in the cart or inn respectively, survives; but *temp. Henry VI*¹ it seems that an analogous liability lay on all who professed a 'common calling,' such as a smith or a 'common marshal' (*maréchal* still means 'farrier' in France). In bringing an action against such for non-feasance it was unnecessary to allege *assumpsit*, for such persons were notoriously in a chronic state of *assumpsit*. Their business was to 'hold themselves out.' 'If I come to an innkeeper to lodge with him and he will not lodge me, I shall have an action of trespass on the case against him.'

There may, however, be present in addition considerations of public policy, for an innkeeper who declines to receive a guest who is unobjectionable lays himself open to indictment².

'Tort Founded on Contract.'

The purely tortious aspect of the *assumpsit* still survives in the liability of the 'gratuitous bailee,' and in those cases which have been misnamed 'Tort founded on Contract.'

¹ See Y. B., 19 Hen. VI, 49 (5), and Y. B., 21 Hen. VI, 55 (12).

² *Fell v. Knight*, 8 M. & W. 269, and *R. v. Ivens*, 7 C. & P. 213.

No man is bound to take charge gratuitously of another's property, but if he 'intermeddle' and receive the property he is bound to take reasonable care of it. There is a legal duty which exists in all men not to injure the property of others, and if the goods of another are lawfully on your premises, or are there with your licence, or with your acquiescence, you are answerable for any damage occasioned by your negligence¹.

And although there may be a contract between the parties, e.g. of agistment or bailment, this common law liability exists independently of the contract. The liability under the contract may be more extensive than this common law liability. If the duty lies within the common law liability arising out of the relations of the parties, the plaintiff need not go to the contract, for the liability is tortious, but if it is outside he must rely on the contract and then it is contractual.

So in *Corbett v. Packington*², which was decided at a time when counts in tort and contracts could not be joined in the same declaration, it was held that a count alleging that the plaintiff had delivered certain pigs to be taken care of for reward, and that the plaintiff had in consideration thereof agreed to take care of them and re-deliver them, was a count in *assumpsit* (contract) and could not be joined with a count in tort for negligence in keeping, because the alleged obligation to re-deliver went beyond the common law duty of the defendant as bailee, and could only arise out of the contract³.

¹ See *Hayn v. Culliford*, 4 C. P. D. 182, and *Meux v. G. E. Ry. Co.*, 1895, 2 Q. B. 387 (C. A.).

² 6 B. & C. 268.

³ Per Collins L. J., in *Turner v. Stallibrass*, 1898, 1 Q. B. 56 (C. A.).

APPENDIX II

THE HALIFAX GIBBET-LAW AND THE COURT OF THE SAVOY

WE are indebted to Mr. Justice Stephen for preserving the record of two institutions which throw light on the nature of trial by jury in its earliest form. The first is the Halifax Gibbet-Law. Halifax, it is stated in the tract from which Mr. Justice Stephen has taken his information, is part of the Duchy of Lancaster. It has an ancient custom that 'if a felon be taken within their liberty, with goods stolen out of or within the liberty or Precincts of the said Forest, either handhabend, backberand, or confessand, cloth or any other commodity to the value of 13½d., that they shall after three markets or meeting days within the town of Halifax next after such his apprehension, and being condemned he shall be taken to the gibbet and there have his head cut off from his body.'

The procedure was as follows. There were seventeen townships and hamlets within the liberties who chose the most wealthy and best reputed men for their jurors. When a felon was arrested he was brought before the bailiff of the manor of Wakefield. The bailiff detained the prisoner, and summoned the constables of four other towns to require four frith burghers from each of those towns to attend at the proper time. If then, when the prosecutors and the felon are brought before the jury and the thing stolen is pro-

duced, and ‘upon examination they do find that the felon is not only guilty of the goods stolen, but also do find that the value of the goods stolen to be 13½d. or above, then is the felon found guilty by the said jury.’ The verdict is found upon the evidence of the goods stolen and lying before them, together with his own confession ‘which in such cases is always required.’ He is then condemned to be beheaded according to the ancient custom. He was sent to prison for a week: there were three market days in every week, he was exposed publicly in the stocks each market day with the goods on his back or by him. After that he was executed by the gibbet, which was a sort of guillotine.

It seems that the rule that the prisoner must be taken ‘confessand’ was considered to be satisfied if he could not give a satisfactory account of his possession of the stolen goods, ‘and doth refuse when asked to tell where he found it or how he came by the same, nor doth produce any witness to testify for him how he came by such things, but seeks to evade the truth of the matter by trivial excuses, various reports and dubious stories.’

In illustration there is given an account of the trial of three men in 1650, which was the last instance when the custom was enforced. They were accused of stealing certain goods. They were given into the custody of the chief bailiff of Halifax, who summoned the constables of Halifax, Sowerby, Warby, and Kircoat, requiring them to attend each with four men at the High Bailiff’s House on April 27 to hear, examine and determine the cases. Sixteen jurors accordingly came, and in a convenient room were brought face to face with the prisoners and the goods. They were charged by the bailiff to make diligent search and inquiry, and the informations against the various prisoners were brought in and alleged. As the jurymen seemed to have some doubt about the reply of one of the prisoners to the

information laid against him, they adjourned till April 30, and on April 30 met again, and after full examination and hearing of the whole matter, found two of the men guilty by their own confession, and one not guilty. And the sentence concludes ‘by the ancient custom and liberties of Halifax whereof the memory of man is not to the contrary the said Abraham Wilkinson and Anthony Mitchell are to suffer death by having their heads severed and cut off from their bodies at Halifax Gibbet, unto which verdict we subscribe our names April 30, 1650.’

Now we notice here that the towns are represented each by four men who are brought up by the constable who is the representative of the reeve. They must have questioned the prisoners in order to take their confession, and when one of the prisoners contradicts a statement ascribed to him, they adjourned for three days, probably to make inquiries. After the adjournment they talk it all over again with the prisoners, and get further confessions. The jury not only find the facts but, like the suitors in the old County Court, are the judges, the bailiff only registering their sentences. There is nothing to show that either of the guilty men were taken handhabend or backberand, and what confessand amounted to is extremely doubtful. Perhaps unsatisfactory answers and alleged admissions to other persons than the jurors.

The other institution is the court of the Liberty of the Savoy, which is still in existence. Mr. Justice Stephen was indebted for his information to the late Mr. Bristowe, Q.C., who was Steward of the Liberty. The Liberty of the Savoy lies west of Temple Bar, along the bank of the river. It has four wards and a court-leet, which meets twice a year. The court consists of a Steward, who presides, and eight burgesses, two from each of the four wards; a jury for the year, consisting of sixteen, is annually elected at the court. On the

day of meeting, the jury are called over and sworn, the oath being the same as is administered to the Grand Jury at the Assizes. They then make their presentments, which are in writing, and signed. If any inhabitant thinks that a neighbour's house is unsafe or disorderly, and he complains verbally or otherwise to the foreman of the jury, the foreman summons his jury. They satisfy themselves in any way they like of the truth of the complaint, and if satisfied they give notice to the offender, and if the nuisance is not abated accordingly, they present the matter next court-day. If the jury think that the party presented ought to be fined, four of their number are appointed to settle the fine. Their finding is conclusive, although they hear no evidence, examine no witnesses, and go through nothing in the nature of a trial. They represent, says Mr. Justice Stephen, that stage in our history at which ordeal and purgation had fallen into disuse, and the substitute for them had not been discovered.

These two survivals take us back, we cannot doubt, to a remote period, which we need not attempt to date. Though they occur in two widely distant parts of the country, they present some features of similarity which are worth observing. In both cases the jury is sixteen, representing four townships or four wards, and in Halifax each panel of four is brought up by the constable of the township, whom we may identify with the mediaeval reeve. In the Halifax case they do not present, that being unnecessary, as the accused is taken *flagrante delicto*, but they say 'guilty' or 'not guilty'; in the Savoy they both present and punish. In neither case are witnesses heard, and in both cases the jury is left to inform its mind as well as it may.

The four townships play a great part, they present at the hundred and county courts, they are part of the coroner's machinery, their opinion is taken on 'culpabilis necne' before

the itinerants. Yet all this falls short of proving that they provided our petty jury of twelve. Perhaps, too, it is of importance to notice that in Edward III's reign, when it was a good ground of challenge that an *indictor* was on the jury of deliverance, it became the custom for the accused no longer to put himself on a particular *pais* or hundred, but on the county generally, although hundredors were always on the jury of deliverance. On the other hand, it may be that by this time the petty jury had become firmly established as an institution, and that the alteration was merely to insure a larger choice of impartial people.

APPENDIX III

THE LITTLE RED BOOK OF BRISTOL

A very interesting and seemingly hitherto unprinted document has been recently published in the Little Red Book of Bristol. It is a treatise in Latin on the *Lex Mercatoria*, in twenty-one chapters, and written in a fourteenth-century hand. It has been transcribed by Mr. Bickley of the British Museum, but the text is in places corrupt and very hard to translate, and ought to be edited with notes by some competent hand. I purpose in this appendix to attempt some indication of its contents.

The first chapter states that the *Lex Mercatoria* or Market Law attaches to markets, and that markets are held in five places ‘in Civitatibus, nundinis, portibus super mare, villis mercatoriis et burgis,’ that in the first two attachment or adjournment is either ‘de hora in horam,’ or ‘de die in diem,’ in ports ‘de daytida in daytidam,’ in market towns, and boroughs (‘villis mercatoriis et burgis’), ‘de mercato in mercatum.’ All pleas naturally belong to it, except pleas of land. But as regards pleas concerning appeals, if the owners of the franchise (*domini*) and the parties choose to remove them into the common law courts and refuse the law merchant they may, and usually do.

The second chapter treats of how the Law Merchant differs from the Common Law, and the differences are three.

- (1) Its process is swifter.

(2) If a plaintiff puts any one under pledge to answer for trespass, covenant, debt, or detention of chattels, he puts him under pledge for the whole debt, damages, and costs¹.

(3) The law merchant does not admit any one ‘ad legem in parte negativa,’ but it is the duty of the plaintiff to prove his case by *secta* or by deed, or both, and not the duty of the defendant. And if one buys from or barters with a merchant, whether himself be merchant or no, he must answer according to the *Lex Mercatoria* if he can be found or attached within the five places where markets are held, so long as the thing is merchandise or ‘ad mercandisam suam spectans.’ The same is the rule where a merchant does not keep his engagement, whether with a merchant or not, unless they agree to go to common law².

¹ At common law, the ordinary process in an action for debt was by a writ of ‘iusticies,’ e.g. ‘quod reddit x marcas quas ei debet ut dicit,’ when, Fleta says (p. 134), the sheriff will not move till he has taken pledges to prosecute, which he thinks wrong. The plaintiff then offers pledges, and *securitate recepta* the debtor is summoned by two of the *vicinetum* to come and answer at the next court. If he neither comes nor sends excuse, then on proof of summons, and the plaintiff being present, he is directed to be distrained till he gives pledges ‘de parendo iuri proximo die com.’ If he finds them and still does not come, the pledges are fined and another distress issues till he does come. If he comes and loses, the plaintiff recovers ‘debitum cum dampnis,’ which shall be taxed by the sheriff and suitors of the county.

No final costs were recoverable at common law by plaintiff or defendant. But by the Statute of Gloucester, 6 Ed. I, c. i, the defendant may recover against the tenant the cost of his writ purchased (which by a liberal interpretation has been construed to extend to the whole costs of his suit), together with the damages given by that statute. ‘And this Act shall hold place in all cases where a man recovers damages,’ cf. 2 *Inst.* 288.

² In the view of the early common law, it was no part of the business of the court to weigh the proof, it simply declared who should give it, and in what manner, and then what the judgement should be after its completion. Proof was not to convince the court, but to satisfy the opponent. Proof was largely one-sided, and the question was who was to give it. It might be a privilege, or it might be fatal. It was

Chapters III and IV deal with the topics of pledges to prosecute, and of essoins, which seem to be similar to the common law procedure. Precedents are given, from which we see that the style of the Court is, in London ‘coram vicecomite,’ in a fair ‘coram seneschallo feriae,’ if in a borough ‘coram preposito mercati,’ if in a city ‘coram maiore et ballivis.’

Chapter V deals with persons attached, and the process of attachment against them and their pledges.

Chapter VI treats of the important subject of the recovery of debts where there is no writing or tally, and where wager of law is not allowed. The practice is stated as follows. If *B* is attached to answer for debt, *detinue*, covenant, trespass, or other mercantile plea, and demands, say in debt, what the plaintiff *A* has to show for it, and *A* says ‘good suit,’ though the defendant *B* may desire to wage his law to prove that he owes nothing, this is not permitted, because it is notorious that merchants and their apprentices and servants often deliver (?) ‘apprestant’ goods without writing or tally, and it would be inconvenient, nay impossible, to use these formalities always. So if *B* ‘precise negat,’ a day is given for *A* to bring his proofs, and for *B* to hear them, not every complaint or every affirmative defence, not a *simplex vox*, that was to saddle a man with this burden. Cf. *Magna Charta*, 38, and cf. Bracton, *N. B.* ii, case 260 ‘Et quia praedictus Rogerus nihil ostendit . . . nec sectam producit nec cartam profert nec aliquid aliud nisi simplicem vocem suam,’ &c. So Fleta, 137, says that no free man shall be put ‘ad legem nec ad iuramentum per simplicem loquela sine testibus fidelibus.’ But if he produces *secta*, i. e. testimony of legal men ‘qui contractui interfuerint praesentes,’ then the defendant may wage his law, by producing twice as many up to twelve. ‘In hoc casu semper incumbit probatio neganti.’ But he is not bound to wage his law against a *secta variabilis*, i. e. one that did not agree. We may notice that Fortescue (*De laudibus*, c. 21) observes that by the course of the *Civil Law* the party who upon the trial holds the affirmative side of the question is to produce his witnesses, whom he can name at pleasure. On the other hand, he says, a negative cannot be proved.

and rebut them if he can, unless *A* has his *secta* there on the spot, in which case they are produced and examined. They are separately sworn to tell the truth, not 'secundum credulitatem,' to the best of their belief, but 'de veritate sub periculo suo.' They are examined by the steward before the parties and the whole Court. If there is a suspicion of conspiracy, the other witnesses are ordered out of Court, but if they are men of credit they may hear each other's testimony. If *A* names witnesses who will not appear, or who require payment for their evidence, and they are distrainable within the jurisdiction of the Court, they are distrained by the bailiff till they come. If they are outside the jurisdiction, *A* is allowed till the third Court to produce them. If he cannot, *B* goes quit, with costs at the discretion of the merchants of the Court. *B* then cannot be impleaded of the same cause of action, till his costs have been paid, and the costs are thereon straightway levied and paid over in Court, and a copy of the record can be claimed by the parties for production at other market courts. If *A* can prove his case by three credible witnesses, he recovers (unless *B* finds new security for convicting *A* and his witnesses in an attaint), and gets damages and costs assessed by the merchants of the Court. But where the fair or market can have full knowledge of the truth, the case is settled by inquisition and not by the merchants of the Court.

But if *B* does not deny simply the plaintiff's story, but says, for instance, that he was once indebted, but has long since paid the debt, he is allowed to prove his defence, because, though he was at first defendant, such an answer makes him plaintiff. And the defeated party always pays damages and costs to the winner¹.

¹ This procedure, which is much the same as our civil procedure of to-day, contrasts very favourably with the antiquarianism of the common law. In 1587, when the Chancellor asked the judges if a man were discharged of his debt by waging his law, they said, 'Yes,' but

Chapter VII states that merchants are liable for goods lent (*mutuata*) to their apprentices and submerchants.

Chapter VIII gives the rule that if a man, dog, cat, or other beast escapes alive from a ship it is no wreck, and the goods must be kept by the proper authority for a year and a day, for the owner, and then they revert to the king. This agrees with the Statute 3 Ed. I, c. 4. It seems that it

Manwood C. B. said it was the plaintiff's folly, for, had he sued in assumpsit, the defendant could not have waged his law. Wager of law was not allowed where the cause of action was a tort (*London v. Wood*, 12 Mod. 677). It was finally abolished by 3 & 4 Will. IV, c. 42.

According to Fleta the practice was as follows. If *A* brought an action in debt, and had only his own voice (*vox sola*), the defendant went quit (p. 132). If *A* produced a *secta*, either *ad vocem probandam* or to prove a tally, the defendant waged his law by producing twice the number of *A*'s witnesses up to twelve (p. 137). A tally without a supporting 'secta' could be disposed of by the defendant's oath. A *secta variabilis* was no *secta* at all (p. 138). Against his own writing the defendant could not wage his law. Fleta in these passages notices the different practice of the merchants. 'Tallias deditas per testes idoneos conceditur mercatoribus de gratia principis probare, ad minus per duos iuratos qui de die, loco, et numero et aliis circumstantiis concordes per diligentem examinationem inveniantur' (p. 132). They prove their tallies 'per testes et per patriam.' If the defendant produces a tally against the plaintiff's tally alleging payment of the debt, the defendant can go round nine churches and swear at nine altars that he has paid, and go quit (p. 138). But as this practice was abused the 'statute merchant' was invented (Statute of Acton Burnell, 11 Ed. I, and 13 Ed. I, st. 3), viz. 'Noverint universi me A. de tali Com. teneri B. in x marc' solvend' eidem ad festum Pentec' anno regni regis, &c. Et nisi fecero concedo quod currant super me et heredes meos districtio et poena provisae in statuto Domini Regis edito apud Westm. dat. London tali die anno supradicto.'

In the Liber Albus (*Munim. Gild.* i. p. 203) the usages of the City of London are mentioned. In pleas of debt the defendant may wage his law seven-handed, but if a foreigner, three-handed. If he cannot find two, he must go at the plaintiff's request to six churches nearest the Guildhall and swear that his oath was good. If he does so, the plaintiff is amerced. Also against a sealed tally by City usage the defendant has no law, but he may deny that the date of payment is correctly alleged. See also the Doomsday of Ipswich, *Bl. Bk. of Admiralty*, ii. 127.

was hoped that the escaping animal might give a clue to the ownership, and that marks on the goods identifying the owner prevented it being considered wreck, and so a royal perquisite¹.

Chapter IX. Within the five places aforesaid, the *lex mercatoria* is always the law, unless both parties agree to go to common law, for the common law is *mater legis mercatoriae*, and has granted her daughter this privilege.

Chapter X is important as dealing with the challenges against *testes* and *iurati*. In an inquisition, the *iurati* may be challenged for relationship, affinity, tenancy, apprenticeship, conspiracy, intimidation, in short for everything that may make it probable that the juror will not or dare not speak the truth. But no witness can be challenged so long as he is free and of good report, and has sufficient property to make restitution to the defendant in case he is subsequently convicted of perjury; and even though his property be insufficient, he cannot be challenged if the principal gives security that he will make up the deficiency².

¹ Bract., l. 3, c. 3.

² The *testes* here must be identified with the *secta* of a previous chapter. It will be noticed, however, that the mercantile *secta* plays a more important part than the old common law *secta*, which only showed a probable cause of action, a ‘probabilis monstratio,’ a mere prelude to the one-sided proof, and which finally became a mere form. These witnesses gave ‘evidence,’ and were examined carefully. In the ‘Consuetudines Ville Bristol,’ the first entry made in *The Little Red Book*, pp. 24–44, we find:—‘Also it is ordained and agreed that when any one, be he citizen or stranger, declares his intention to prove in pleas of debts, contracts, covenants, or transgressions, he can prove by witnesses, being citizens or strangers, who were present at such contracts, on oath . . . that they shall say nothing else than what they have heard and seen. And such witnesses shall be examined by burgesses of the town sworn . . . and be in no way examined by strangers.’ The oaths of witnesses (pp. 52–3, temp. Ed. III) are in the following form:—In debt: ‘Nous veritee dirroms de ceo qe vous me demaundretz dune dette qe A demaunde vers B en ceste court, et en ceo nul faus dirray, sy m’eyde dieux.’—Saunz dire a son ascient, quia dicet de veritate suo periculo.

Chapter XII. In every market Court judgement shall be given by the merchants of the Court, and not by the mayor or steward: If these interfere, action lies against them. The 'suitors' of the Court are all who are *feoffati et residentes* within the bounds of the five places, and all merchants who habitually frequent those markets, and those whose names are in the market list (*papiro mercati*), except 'clericci comites Barones Baroneti vel milites.'

Chapter XIII treats of executing judgements. If the bailiff is resisted, he reports to the *dominus* or mayor, who summons the merchants. Twelve are picked out, and others more or less from the Court, as necessity demands, in order to overcome resistance. If active resistance is still offered, the hue and cry is raised, and the contumacious defendant is attached personally and lodged in prison till he satisfies the judgement and pays damages and costs to all who were summoned and came. The common law and the law merchant deem all who are *feoffati et residentes* in these places to be merchants though they do not trade, with the exceptions above stated. There are also some rules regulating the forcing of locks and the breaking of bulk under an execution.

Chapters XIV and XV are occupied with the methods of making distrainments, and the proper custody of things distrained.

Chapter XVI gives the obligation of clerks of the markets to make authentic transcripts of the pleas for the parties at a certain price.

Chapter XVII states that every market must have its seal, which is to be kept with great precautions.

Chapter XVIII gives the rule that in every merchant Court the lord or the mayor shall have a clerk, and rolls containing the pleas therein pleaded, and the 'suitors' or

communitas must have a clerk and rolls of their own. This is necessary for their own protection, as the penalties of a false judgement fall not on the lord but on the suitors, for it is their judgement.

According to Chapter XIX apprentices must give pledges to secure their masters against loss caused by negligently parting with the masters' goods.

Chapter XX deals with attaints in a full and interesting account. Attaints are not granted without a king's writ in the merchant Courts where there has been an inquisition, for the parties have consented to this method. But where a *secta* has been examined in open Court, such examination being conducted by the steward and two of the more discreet merchants chosen by the Court, before judgement is given the defendant is asked if he has anything to say why judgement should not be pronounced according to the evidence. The defendant then in his proper person and not by attorney may declare himself prepared to convict the plaintiff and his witnesses of perjury. He swears that the claim is false, that the witnesses whom he names have lied, and that he will prove the same to the best of his ability. He must then find security by gage and pledges sufficient to satisfy a fresh amercement if he fails. He is then given a day at the next Court, or the next but one, to bring his witnesses, the successful plaintiff being notified that he may come and hear, and take what steps he thinks fit. Both can bring witnesses, the challenger to disprove, the plaintiff to 'afforce' or strengthen the first *secta*. The better proof wins, subject to this, that to succeed the challenger must produce at least two more witnesses than the original plaintiff, for the law favours possession. In case the witnesses are at a distance, or are unwilling to come gratis, longer time is allowed. But if at the hearing the appeal fails, the plaintiff and his *secta* go quit, and the unsuccessful

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party has to pay the damages and costs incurred by the adversary. The appellant after the first stage, when he takes his corporal oath, can appear by attorney.

The last chapter gives precedents of certificates of proceedings sent by one merchant Court to another to enable plaintiffs and defendants to prove that a matter is *res iudicata*.

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